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No. 03-1652

IN THE

Supreme Court of the United States

JOHN DOE I, JANE DOE, AND JOHN DOE II,
Petitioners,

v.

BILL TANDESKE AND GREGG RENKES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

GREGG D. RENKES
Attorney General

KENNETH M. ROSENSTEIN *
Assistant Attorney General

STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Petitioners, two convicted sex offenders and the wife of one of them, challenged the constitutionality of the Alaska Sex Offender Registration Act, Alaska Statute 12.63.010 *et seq.* and Alaska Statute 18.65.087, alleging in part that the Act violated their substantive due process rights under the Fourteenth Amendment. The question presented is:

Whether the Ninth Circuit, on remand from this Court, correctly determined that the registration and notification requirements of the Act did not violate the Fourteenth Amendment because it infringed none of the petitioners' fundamental rights and is reasonably related to the legitimate state interest of protecting the public from recidivist sex offenders.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals [Pet. App. 1a] is reported at 361 F.3d 594. The decisions of the district court [Resp. App. 1a, 42a] are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2004. The petition for a writ of certiorari was filed on June 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

Amendment XIV, section 1 of the United States Constitution provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Article I, section 12 of the Alaska Constitution provides in part:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

The relevant statutes, rules, and administrative regulations involved are set forth in the appendix to the petition and in the appendix to this brief. [Pet. App. 5a ff.; Resp. App. 47a ff.]

STATEMENT OF THE CASE

Statutory Background. By 1993 Alaska had the unfortunate distinction of having the nation's highest rate of child sexual abuse, six times the national average; its rate of sexual assault, the second highest in the nation, had nearly doubled in the preceding two years.[1] Based on these exploding rates and on the high risk of recidivism among convicted sex offenders, Alaska's legislature responded to this crisis by enacting in 1994 the Alaska Sex Offender Registration Act

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[1] *See Hearing on HB 69 Before House Judiciary Comm.* at 612, 18th Alaska Legis., 1st Sess. (February 10, 1993) (available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=18&beg_line=0392&end_line=0954&time=1300&date=19930210&comm=JUD&house=H (visited August 10, 2004)); *Hearing on HB 69 Before Senate Finance Comm.*, 18th Alaska Legis., 1st Sess. (April 28, 1993) (available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=18&beg_line=0089&end_line=0219&time=1455&date=19930428&comm FIN&house=S (visited August 10, 2004)).

(Act), Alaska Statute 12.63.010 *et seq.* and Alaska Statute 18.65.087 (1994). *See* 1994 Alaska Sess. Laws, ch. 41, § 1. [Pet. App. 5a] *See also McKune v. Lile,* 536 U.S. 24, 32-34 (2002) (sex offenders present "serious threat in this Nation"; risk of recidivism by sex offenders is "frightening and high").

As enacted and amended the Act comprises two components. First, the Act requires registration of convicted sex offenders and child kidnappers. Second, the Act creates a central registry through which information about registered offenders is made available to the public. (These components, summarized here, are described in more detail in *Smith v. Doe,* 538 U.S. 84, 90-91 (2003).)

The registration component requires sex offenders or child kidnappers physically present in Alaska to register with either the Alaska Department of Corrections or a law enforcement agency. Alaska Stat. 12.63.010(a), (b). [Pet. App. 9a-10a] The offender does this by completing a form, providing his or her name, date of birth, address and any anticipated change of address, place of employment, information about each sex offense or child kidnapping conviction, any aliases used, any identifying physical features, driver's license number, description of vehicles he or she has access to, and a statement indicating whether he or she has had any postconviction mental health treatment. Alaska Stat. 12.63.010(b)(1). [Pet. App. 9a-10a] In addition, each offender registering for the first time is photographed and fingerprinted. Alaska Stat. 12.63.010(b)(2). [Pet. App. 10a] Criminal sanctions are imposed for knowingly failing to register as required under the Act. Alaska Stat. 11.56.835, 11.56.840. [Pet. App. 8a; Resp. App. 48a]

An offender convicted of a single, nonaggravated sex offense or child kidnapping must register for 15 years after unconditional discharge from his sentence and verify the registration information annually in writing. Alaska Stat.

12.63.010(d)(1), 12.63.020(a)(2). [Pet. App. 11a-13a] An offender convicted of an aggravated sex offense or more than one sex offense or child kidnapping must register for life and submit quarterly verification. Alaska Stat. 12.63.010(d)(2), 12.63.020(a)(1). [Pet. App. 11a-12a]

The information provided by sex offenders is managed by the Alaska Department of Public Safety and maintained in a central registry of sex offenders. Alaska Stat. 18.65.087(a). [Pet. App. 17a-18a] An offender's fingerprints, driver's license number, anticipated change of address, and disclosures of mental health treatment are kept confidential. Alaska Stat. 18.65.087(b). [Pet. App. 18a-19a] The remaining information may be made available to the public. *Id.* The Act does not specify how this information should be made available. Alaska has chosen to use the Internet. *See* Alaska Dep't of Public Safety, *Sex Offender Registration Central Registry* (http://www.dps.state.ak.us/nSorcr/asp/) (visited August 10, 2004). (Information about an offender's vehicles is not included in listings on the website. *Id.*)

Facts. Petitioner John Doe I was convicted of first-degree sexual abuse of a minor, an aggravated sex offense which requires sexual penetration of the victim, and second-degree sexual abuse of a minor. He pled no contest and was sentenced to 12 years' imprisonment with 4 years suspended. He was released from prison in December 1990. He married petitioner Jane Doe, who is not a convicted sex offender, after his release.

Petitioner John Doe II was also convicted of first-degree sexual abuse of a minor. He pled no contest and was sentenced to eight years' imprisonment. He was released from prison in May 1990.

Both John Doe I and John Doe II are required to register as sex offenders because they were convicted of aggravated sex offenses, as defined in Alaska Statute 12.63.100(1) and had

not been unconditionally discharged from their convictions before July 1, 1984. 1998 Alaska Sess. Laws ch. 106, § 25. [Pet. App. 7a, 14a-13a]. They are subject to lifetime registration and quarterly verification.

Proceedings below and in this Court. Before the Act became effective, petitioners challenged it in federal court under 28 U.S.C. 1983. Petitioners asserted that the Act violates the Due Process Clause and their right to privacy. They also claimed the Act violated the Ex Post Facto Clause. But petitioners did not raise a substantive due process claim in their district court pleading. They alleged in their amended complaint that the Act would (1) subject them to ridicule, interfere with their rights to work, to travel within the State of Alaska, to live peaceably, and to privacy; (2) violate procedural due process by infringing a liberty interest arising under the Alaska Constitution's article I, section 12, governing penal administration; and (3) violate procedural due process by subjecting them to registration without providing them an opportunity to show they were no longer dangerous. The district court granted summary judgment in favor of respondents, ruling that the Act did not violate the Ex Post Facto Clause or the petitioners' procedural due process or privacy rights. [Resp. App. 18a-19a, 26a]

Petitioners appealed. In addition to their ex post facto claim they initially argued that the Act arbitrarily failed to distinguish the relative seriousness of sexual offenses[2] and violated their (1) liberty interest arising from their right to privacy under the Alaska Constitution, (2) freedom from constant suspicion, and (3) rights to rehabilitation (under the Alaska Constitution), to personal safety, to travel, and to

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[2] Both John Does ignore that they were convicted of first-degree sexual abuse of a minor, an unclassified felony, a designation reserved for the most serious criminal offenses. *See* Alaska Stat. 11.41.434(b) (1983), 11.81.250. [Resp. App. 47a, 49a]

employment. The Ninth Circuit reversed, addressing only the petitioners' ex post facto claim, and did not reach their due process claims. *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001).

This Court granted respondents' petition for a writ of certiorari. *Otte v. Doe*, 534 U.S. 1126 (2002). The Court ultimately reversed the Ninth Circuit's decision, holding that the Act "is nonpunitive and its retroactive application does not violate the *Ex Post Facto* Clause." *Smith v. Doe*, 538 U.S. 84, 105-06 (2003). The Court remanded the case to the Ninth Circuit for consideration of the unresolved due process issues. *Id.* at 106.

In their supplemental brief filed in the Ninth Circuit after the remand, petitioners expanded their claim to include alleged invasions of their rights (1) to autonomy from government monitoring, (2) to privacy from hyperpublic exposure, (3) to be free from government-imposed stigma, and (4) to be left alone. They further claimed that each of these rights was fundamental under the federal constitution. The Ninth Circuit rejected petitioners' due process claims. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004) (per curiam).

The Ninth Circuit first addressed petitioners' claim that requiring them to register violates their right to procedural due process by "depriv[ing] them of protected liberty interests without notice or the right to be heard." *Tandeske*, 361 F.3d at 596. The court rejected this claim based on this Court's decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (procedural due process satisfied when duty to register turns solely on whether person has sex offense conviction), *quoted in Tandeske*, 361 F.3d at 596.

The Ninth Circuit also rejected petitioners' claim that the Act violated their right to substantive due process, which protects only "those personal activities and decisions that this Court has identified as so fundamental to our concept of constitutionally ordered liberty, that they are protected by the

Fourteenth Amendment." *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997), *quoted in Tandeske*, 361 F.3d at 596. The court concluded that persons "convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute." *Id.* at 597.

Finding no infringement of fundamental rights, the Ninth Circuit held that state action survives substantive due process scrutiny if the government demonstrates a "'*reasonable relation* to a legitimate state interest to justify the action.'" *Tandeske*, 361 F.3d at 597 (emphasis by the court) (quoting *Glucksberg*, 521 U.S. at 722). The court concluded that the Act satisfied that test based upon the determination in *Smith* that the Act serves a "legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their community.'" *Smith*, 538 U.S. at 102-03 (quoting *Doe v. Otte*, 259 F.3d at 991), *quoted in Tandeske*, 361 F.3d at 597. The Act's "broad categories" of sex offenses, differentiating between aggravated and nonaggravated offenses, and the corresponding duration of the registration requirement "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102, *quoted in Tandeske*, 361 F.3d at 597. Consequently, "Alaska law does not violate the Does' rights to substantive due process." *Tandeske*, 361 F.3d at 597.

Misstatements in petitioners' statement of the case. The respondents are compelled to address the numerous misstatements made in the petitioners' statement of the case. *See* Sup. Ct. Rule 15.2 (admonishing opposing counsel to point out any misstatements of fact or law in petition). [Resp. App. 58a]

1. Petitioners mischaracterize the Alaska legislature's motive as a "purported need to infringe on the liberty" of convicted sex offenders. [Pet. 2] In actuality, it was the need to protect the public from recidivist sex offenders that

motivated the legislature's action. *Smith*, 538 U.S. at 105 ("recidivism is the statutory concern"); 1994 Alaska Sess. Laws ch. 41, § 1 [Pet. App. 5a]. This in turn necessitated that the privacy interests of those offenders, on balance, must yield to the government's superior public safety interest. *Id.*

2. Petitioners assert that the central registry "label[s] the registrant as dangerous persons [*sic*] to be avoided." [Pet. 2] As evidence of this, they cite two statutes. This is the first instance in which petitioners have cited these statutes, which were enacted in 1998, as having any bearing on their claims. The first, Alaska Statute 11.51.100(a)(2), defines first-degree endangering the welfare of a child as leaving a child with a nonparent who is required to register under the Act. [Resp. App. 48a] The second, Alaska Statute 47.10.011(7), provides that leaving a child with a person who required to register under the Act amounts to prima facie evidence that the "child is at substantial risk of being sexually abused."[3] [Resp. App. 55a]

The statutes cited by petitioners exist independent of the Act. Reference to persons required to register under the Act has no purpose other than to provide a shorthand description of the persons who are the object of the statutes. The statutes could have described (but more verbosely) their object, without referring to the Act, as persons who had been convicted of specific sexual offenses within a particular time frame.

Petitioners also rely on those same two statutes as purported evidence that fundamental parental rights may be infringed "[s]olely as a result of the [Act]." [Pet. 4] But this

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[3] Petitioners also cite Alaska Statute 34.70.050. [Pet. 2; Resp. App. 54a] But this provision merely requires notice to a transferee of residential property that the transferee is responsible for determining whether a convicted sex offender lives in the vicinity; it does not even refer to the Act.

misstates the effect of the Act and the statutes. Any alleged infringement of parental rights or criminal prosecution under those statutes results not from a sex offender's duty to register, but rather as a result of someone other than a sex offender leaving a child with a convicted sex offender. Again, referring to registered sex offenders is used only as a shorthand method of describing those with whom a child may not be left. Moreover, Alaska Statute 11.51.100(a)(2) applies only when the sex offender with whom a child has been left is not that child's parent and thus cannot affect the parental rights of a registered sex offender.

3. Petitioners assert that the Act requires convicted offenders to "gather, collate, verify, and deliver a variety of information about themselves and their crimes." [Pet. 3] This grossly overstates the requirements of the Act. The one-page form used for initial registration and periodic verification calls for information that most people inherently know: name, height, weight, date of birth, gender, address, employer, employer's address, and home and work telephone numbers. Alaska Dep't of Public Safety, *Sex Offender/Child Kidnapper Registration Form*, ¶¶ 1-11, 13-33, 37, 38.[4] Though other information might not be committed to memory, it is readily obtainable: license plate and vehicle identification numbers of vehicles to which an offender has access, and the offense, date, and court of record for each offense of which an offender was convicted. *Id.* at ¶¶ 34-35.

Petitioners also assert that the Act requires convicted offenders to "collect and release mental health records." [Pet. 3] Nothing could be further from the truth. The Act requires only that an offender indicate whether he or she has received postconviction mental health treatment. Alaska Stat. 12.63.010(b)(1)(H). [Pet. App. 10a] This takes the form

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[4] Available at http://www.dps.state.ak.us/nSorcr/pdf/12-29961_Oct 2002 .pdf (visited August 11, 2004).

of simple "yes" and "no" check boxes on the registration form. *Sex Offender/Child Kidnapper Registration Form*, ¶ 36. Nothing in either the Act or the regulations [Pet. App. 27a-35a] requires offenders to collect or release mental health records.

4. Petitioners cite a law amended in 2003, Alaska Statute 44.41.035(b)(5), that requires those who must register as sex offenders to submit a DNA sample for inclusion in Alaska's DNA identification registration system. [Pet. 3; Pet. App. 21a-27a] Petitioners never asserted this claim in the district court. They first asserted this claim in their supplemental brief in the Ninth Circuit, but that court did not consider it. Nor should this Court.

More important, the DNA collection statute is not part of the Act and, like the other statutes newly cited by petitioners, simply refers to the requirement of registration as a shorthand method of describing those who must submit to DNA collection. Petitioners are thus mistaken when they assert that their Fourth Amendment rights are infringed "solely as a result of the [Act] and its provisions." [Pet. 4] Any infringement, even assuming one exists, comes not as a result of the Act, but rather as a result of the fact that a person has been convicted of a sex offense.

5. Petitioners mention in passing that some of the information they must provide is protected under "other state and federal laws such as State laws prohibiting access to motor vehicle records, and federal law prohibiting access to medical and mental health records." [Pet. 3, 5] Petitioners do not specify any of these laws. As stated above the Act does not require sex offenders to disclose or authorize access to any of their medical or mental health records.

No Alaska statute prohibits disclosure of information about registered motor vehicles. Personal information, *i.e.*, "information that identifies a person," contained in Alaska's motor

vehicle records may be disclosed only for specific purposes, which include "use by a government agency." Alaska Stat. 28.10.505(d)(1). [Resp. App. 51a] Notably, the Act does not require a sex offender to identify the owner of any motor vehicles or to provide information about anyone other than the offender. Alaska Stat. 12.63.010(b)(1); *see also Sex Offender/Child Kidnapper Registration Form*, ¶ 34.

REASONS FOR DENYING THE PETITION

The Ninth Circuit correctly ruled that the Act infringes neither the petitioners' procedural due process rights nor their substantive due process rights. That ruling does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore unwarranted.

The respondents will first explain why the Ninth Circuit's decision is correct. The Ninth Circuit dealt with the petitioners' substantive due process claim in a general fashion without separately analyzing each of the liberty interests now asserted by the petitioners. Though that court's conclusion was correct, respondents believe it necessary to briefly discuss the individual interests asserted by petitioners. Respondents will conclude by explaining why this case also does not satisfy the criteria for this Court's review.

The Ninth Circuit decided this case correctly. The Due Process Clause affords special protection to "fundamental rights and liberties." *Glucksberg*, 521 U.S. at 720-21. This Court has described those rights and liberties as "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* (internal quotations marks omitted). The Due Process Clause prohibits government infringement of rights and liberties deemed fundamental, no matter how reasonable, "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993), *quoted*

in Glucksberg, 521 U.S. at 721. If the right or liberty asserted is nonfundamental, however, then the government action need only be reasonably related to a legitimate state interest. *Flores*, 507 U.S. at 305; *see also Glucksberg*, 521 U.S. at 722; *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

The beginning point of substantive due process analysis is a "'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (quoting *Flores*, 507 U.S. at 302). The Ninth Circuit described the interest claimed here as the "right to be free from the registration and notification requirements [of the Act]." *Tandeske*, 361 F.3d at 597. Implicit in this claim is a purported right of a convicted sex offender to conceal from the public truthful information in which he or she has no reasonable expectation of privacy.

1. Petitioners err in their unsupported claim that the requirement to register infringes a fundamental liberty interest.[5] Indeed, this Court has suggested that registration

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[5] Petitioners' due process claims have transmogrified over the course of these proceedings. Their amended complaint, in addition to alleging violations of their rights to live peaceably, to work, to travel, and to contract, specifically alleged two violations of the Fourteenth Amendment's Due Process Clause, both of which are procedural. The first is a denial of their right to rehabilitation under the Alaska Constitution, article I, section 12, and the other is a denial of their right to prove that they no longer pose a danger to the community. [Am. Compl. ¶¶ 16, 46, 118, 131]

The Alaska Constitution requires that criminal administration be based on the "need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation." ALASKA CONST. art. I, § 12. This provision deals with "penal administration" and thus guarantees a defendant rehabilitative treatment while incarcerated. *Abraham v. State*, 585 P.2d 526, 531, 533 (Alaska 1978) (prisoner has right to rehabilitative alcohol treatment). Petitioners have yet to explain how the Act unduly, if at all, interferes with their rehabilitation, particularly in light

laws are valid exercises of the government's police power: "Registration laws are common and their range is wide." *Lambert v. California*, 355 U.S. 225, 229 (1957) (reversing conviction for failure to register as convicted felon in absence of proof of actual knowledge of registration requirement). *See also United States v. Harriss*, 347 U.S. 612, 625 (1954) (federal statute requiring registration of lobbyists did not infringe lobbyist's First Amendment rights); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 72 (1928) (statute requiring registration of certain associations, such as Ku Klux Klan, was valid exercise of state's police power and did not deprive member of liberty interest by denying right of association), *both cited in Lambert*, 355 U.S. at 229; *Russell v. Gregoire*, 124 F.3d 1079, 1089 (9th Cir. 1997) ("registration is typically and historically a regulatory measure").

As to the public availability of registration information, this Court long ago rejected the proposition that "publiciz[ing] a record of an official act such as an arrest" violated the arrestee's liberty interest. *Paul v. Davis*, 424 U.S. 693, 713 (1976). The Court echoed this principle in the context of petitioners ex post facto challenge to the Act when it wrote that "dissemination of truthful information in furtherance of a legitimate governmental objective" does not amount to punishment. *Smith*, 538 U.S. at 98. Providing this information is a part of a "tradition" mandating that the criminal justice process take place only in public: "[t]ransparency is essential." *Id.* at 98-99. *Cf. Press-Enterprise Co. v. Superior*

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of the fact that they were no longer incarcerated when the Act went into effect.

This Court has already rejected the claim that sex offender should have the right to a hearing to demonstrate that he poses no actual danger to the community when registration is based solely on the existence of sex offense conviction. *See Connecticut Dep't of Public Safety v. Doe*, 538 U.S. at 7-8. That case defeats both of the procedural claims asserted in the petitioners' amended complaint.

Court, 464 U.S. 501, 508-10 (1984) (openness of criminal process "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"; only compelling state interest will justify closure). This tradition of openness in our criminal process would be substantially compromised if it did not extend to the records of that process.

Most important, it is this tradition of openness in the criminal justice process that is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720-21. Petitioners' claim that the concealment of truthful information about an individual and his or her sex offense conviction is a fundamental liberty interest would turn that tradition on its head.

Absent authority supporting the existence of a fundamental right to be free of the registration and public disclosure requirements of the Act, the Ninth Circuit correctly rejected petitioners' claim of such a right and correctly applied the reasonable-basis test. This Court has already concluded, albeit in the ex post facto context, that the Act satisfies that relationship. *Smith*, 538 U.S. at 98-99, 102, 103, 104, 105.

Petitioners attempt to distinguish *Smith* because it involved an ex post facto challenge. [Pet. 10, 12] But this attempt must fail. A state interest legitimate under one provision of the Constitution does not become illegitimate under another. *See Paul P. v. Verniero,* 170 F.3d 396, 404 (3d Cir. 1999) (public interest in knowing whereabouts of sex offenders does not differ depending upon nature of constitutional claim). Similarly, a law's reasonable relation to a legitimate governmental interest under one provision of the Constitution does not become unreasonable under another. *See id.* Petitioners have presented no justification for this Court to revisit its analysis in *Smith.* This Court's review is unwarranted.

Petitioners have not shown due process violations with respect to any of the specific liberty interests they have asserted in their petition. As mentioned petitioners asserted in their supplemental brief filed in the Ninth Circuit a variety of specific interests they claim are infringed by the Act. Save for the right to interstate travel, which the Act does not violate, none of those interests have been recognized as fundamental.

1. Petitioners claim that the Act "subject[s] them to all sorts of burdens, costs, fees, loss of housing—loss of employment—loss of public services—restrictions on interstate travel, and it infringes on . . . [their] right to enjoyment of the community."[6] [Pet. 4-5, 11]

But the Act imposes no such burdens or restrictions. The "Act imposes no physical restraint . . . [and] does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 U.S. at 100. Registered sex offenders "are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101. Further, the record below failed to disclose "substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers or landlords." *Id.* at 100. And the record identified only one incident of community hostility suffered by a sex offender after his registration information became public. *Id.* Moreover, any adverse effects on convicted sex offenders resulting from the availability of registration information "flow[s] not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 101. These observations by the

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[6] Petitioners do not explain either here or in the proceedings below what costs and fees the Act has imposed on them; nor do they explain what loss of public services they have suffered.

Court make clear that the Act does not infringe on petitioners' asserted rights to housing, employment, public services, or interstate travel.

2. Petitioners also assert that the Act is intended as a "means of supervising" and monitoring convicted sex offenders. [Pet. 2, 5-6, 9, 11] But this Court expressly rejected any parallel between the Act's registration scheme and supervised release. *Smith*, 538 U.S. at 101. Registered offenders "are free to move where they wish and to live and work as other citizens, with no supervision" and, while they must inform the authorities of certain changes in their lives, "they are not required to seek permission to [make those changes]." *Id.*

As evidence of Alaska's purported intent to keep convicted sex offenders under supervision, petitioners assert that "they may be called to the police station at the whim of the State or visited at home or work and required to answer questions or provide information." [Pet. 5-6] This is incorrect. The Act requires that a sex offender go to a police station only to register for the first time; subsequent verification may be submitted by mail. *Compare* Alaska Stat. 12.63.010(b) *with* Alaska Stat. 12.63.010(d) *and* 13 Alaska Admin. Code 09.025(d), (e). [Pet. App. 9a-11a, 28a-29a] Though a sex offender *may* be required to appear in person every five years to be photographed, the department can authorize an offender to submit a new photograph without having to appear. 13 Alaska Admin. Code 09.030(b). [Pet. App. 29a-30a]

3. Petitioners also assert that the Act infringes their "right to personal security." [Pet. 4-5] To support this they cite a law review article and media reports of acts of vigilantism committed against sex offenders in states other than Alaska. [Pet. 6-7] This is insufficient to establish that the Act creates a substantial risk of similar incidents committed against petitioners or other convicted sex offenders in Alaska. Indeed, this court acknowledged only one incident of

community hostility toward a sex offender since the Act went into effect. *Smith,* 538 U.S. at 100. At the same time, the Court observed that the incident could have been prompted by information already in the public domain. *Id.* Moreover, the registry web site specifically warns users that "[a]nyone who uses this information to commit a criminal act against another person is subject to criminal prosecution." *Sex Offender Registration Central Registry.*

4. Petitioners also assert a freedom from interference, government monitoring, and supervision, along with a right to return to society after completing their sentences. [Pet. 9] They claim this falls with the scope of their right to personal autonomy. [*Id.*] They overstate the effects of the Act and thus err when they claim that it violates their right to reintegration into society by keeping them "under the shadow" of their crimes, keeping them "under suspicion," and requiring "reporting on demand." [*Id.*]

As noted above the Act results in no supervision or direct monitoring of sex offenders. *Smith*, 538 U.S. at 101 (rejecting comparison of registration system to supervised release). Further, the Act results in no interference with the lives of sex offenders other than imposing a duty to register in person initially and then to periodically verify in writing their registration information. These duties cannot be reasonably viewed as significantly impeding a sex offender's ability to lead a normal life. Similarly, making available to the public truthful information about sex offenders cannot be reasonably viewed as keeping sex offenders constantly under suspicion. Nothing in the Act requires a sex offender to report "on demand." *See* Alaska Stat. 12.63.010(b), (d); 13 Alaska Admin. Code 09.025(d), (e). [Pet App. 9a-11a, 28a-29a]

None of the rights of personal autonomy asserted by petitioners fall within the "outlines of the 'liberty' specially protected by the Fourteenth Amendment[, which] . . . have at least been carefully refined by concrete examples involving

fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. Those examples include the right to marry, to have children, to direct the education and rearing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted medical treatment. *Id.* at 720 (citations omitted). These rights "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), *quoted in Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003). Petitioners make much of the Ninth Circuit's failure to mention *Lawrence*. [Pet. 10-11] But neither the Act nor petitioners' claims involve the type of intimate or personal choices remotely similar to those at stake in *Lawrence*. The Act has no effect on the constitutionally protected aspects of personal autonomy of convicted sex offenders. At the same time the Act affords significant safety to those who might have contact with sex offenders.

6. Petitioners also make the novel claim, not made in either the district court or the Ninth Circuit, that federal courts should be able to conduct substantive due process review of a state statute that violates no federal liberty interests.[7] [Pet. 11-12] Petitioners reason that this is merely a logical extension of federal procedural due process review of claimed violations of state liberty interests. [*Id.*] Because petitioners raise this claim for the first time in their petition, this Court should not consider it. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (except in exceptional circumstances, "this Court does not decide questions not raised or resolved in the lower court").

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[7] In the district court they argued only that the Act violated their state-law liberty interests without procedural due process. [*See* Resp. App. 36a-37a, 39a, 43a-44a]

In the event the Court considers reviewing this claim, it should decline to do so. Petitioners premise their theory on the absence of any liberty interest cognizable under the Due Process Clause and the presence of an interest purportedly cognizable solely under state law. But liberties acquire federal protection under the Due Process Clause because they are "deeply rooted" in our *national* history and tradition such that they are "implicit in the concept of ordered liberty." *Glucksberg,* 521 U.S. at 720-21 (internal citation omitted). Liberties arising exclusively under state law, by definition, have no roots in our national history or tradition. Laws purporting to violate exclusively state liberty interests are thus beyond the reach of substantive review by federal courts unless they also violate federal law. Petitioners' unprecedented and unsupported theory would be antithetical to principles of federalism by effectively allowing federal courts to determine whether state statutes violate state law, a province heretofore reserved exclusively to state courts. *Cf. Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (Supreme Court bound to accept state supreme court's interpretation of state statute but not bound by state court's conclusion that statute violates federal law).

7. Petitioners assert that the Act characterizes them as dangerous without affording them the opportunity to establish that they are not. [Pet. 5] The Ninth Circuit correctly rejected this claim based on *Connecticut Department of Public Safety*, 538 U.S. at 7-8. *Tandeske*, 361 F.3d at 596.

8. Petitioners imply that the Act's characterization of convicted sex offenders as collectively dangerous infringes on their reputation interests. [Pet. 2] But a person's interest in his or her reputation is not a liberty or property interest cognizable under the Fourteenth Amendment. *Paul*, 424 U.S. at 712. For a reputation interest to become cognizable under the Fourteenth Amendment, the government must also "distinctly alte[r] or extinguis[h]" or "officially remov[e]"

from state recognition or protection a right or status recognized under state law. *Id.* at 711. Petitioners can point to no right or status recognized under Alaska law that is altered, extinguished, or removed from protection by the Act.

9. In their supplemental brief petitioners bring to the Court's attention the recent decision in *Doe v. State, Department of Public Safety*, 92 P.3d 398 (Alaska 2004) ("*Doe v. State*"). [Supp. Br. 2; Supp. Br. App. 36a] Citing the principle that state courts are the ultimate expositors of state law, petitioners claim that *Doe v. State* negates this Court's determinations in *Smith* regarding the effects of the Act and therefore supports their petition. [Supp. Br. 1] Alternatively, they assert that it supports summarily granting their petition, vacating the Ninth Circuit's decision, and remanding the case for that court's consideration of *Doe v. State*. [*Id.*] Petitioners ignore crucial aspects of *Doe v. State* and thus are mistaken as to its impact on this case.

In *Doe v. State*, the Alaska Supreme Court decided the narrow issue whether the Act applied to a sex offender whose conviction had been "set aside" after he received a suspended imposition of sentence and successfully completed probation, but before the Act became specifically applicable to such convictions that had been set aside. The court concluded, based solely on Alaska's more rigorous constitutional due process guarantee, that the Act did not apply in those circumstances. *Doe v. State*, 92 P.3d at 400, 404. [Supp. Br. 37a; Supp. Br. App. 47a]

The setting aside of the conviction, according to the Alaska Supreme Court, was based on judicial findings that the offender "presented no significant risk to the community." *Doe v. State*, 92 P.3d at 408 [Supp. Br. App. 57a-58a] With respect to consequences that flowed from the now set-aside conviction, those findings precluded any "subsequent reconsideration whether he posed a significant risk of [reoffending]." *Id.* [Supp. Br. App. 58a] Requiring the

offender to register would effectively reclassify the offender from a person whose conviction had been set aside "to that of a person whose conviction still stands." *Id.* [Supp. Br. App. 61a] In this context the Alaska Supreme Court described the effects of the Act in a manner that, according to petitioners, diverges from this Court's analysis in *Smith*. *Id.* at 409-11. [Supp. Br. App. 61a-65a]

Doe v. State provides no meaningful traction for petitioners in this case, and there is no need to review the Alaska Supreme Court's analysis of the effects of the Act. *Doe v. State* involved a sex offender who, unlike petitioners, had his conviction set aside and whose legal status therefore differed significantly from petitioners', who remain convicted sex offenders. That fact has an overarching impact that drives the court's analysis of the effects of the Act and leads to conclusions different from those reached by this Court in *Smith*. This difference is further magnified by the fact that the Alaska Supreme Court analyzed the Act exclusively within the context of the Alaska Constitution and its "more rigorous" protections afforded to liberty interests than those encompassed by the Due Process Clause. *Doe v. State*, 92 P.3d at 404. [Supp. Br. App. 48a] And most important, the Alaska Supreme Court expressly limited the scope of its decision to only those sex offenders whose convictions were set aside before the Act "became specifically applicable to convictions that were set aside." *Id.* at 412. [Supp. Br. App. 68a] This strongly suggests that any effects of the Act described in *Doe v. State* do not reach constitutional magnitude with respect to those whose convictions were not set aside until after the Act became applicable to set-aside convictions.

Rule 10 considerations. Notably missing from the petition is an attempt to provide any compelling justification for issuance of a writ of certiorari. *See* Sup. Ct. Rule 10 ("A

petition for a writ of certiorari will be granted only for compelling reasons."). [Resp. App. 58a] Indeed, none appears to exist.

1. *No conflict of authority exits among the courts of appeal.* Petitioners cite no conflict between the Ninth Circuit's decision in this case and a decision of the court of appeals of another circuit on the "same important matter." Sup. Ct. Rule 10(a). [Resp. App. 58a] Though no courts of appeals have directly addressed substantive due process claims relating to registration statutes, they have refused to find, in the context of procedural due process, protected liberty interests similar to those asserted by petitioners and rejected by the Ninth Circuit in this case.[8]

2. *No conflict of authority exists among the highest courts of the states.* Petitioners also cite no conflict between the Ninth Circuit's decision and decisions by state courts (other than the purported conflict with the Alaska Supreme Court in *Doe v. State*). *See* Sup. Ct. Rule 10(a). State courts (and the District of Columbia) appear to be unanimous in their refusal to find protected liberty interests similar to those asserted by petitioners.[9]

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[8] *See Artway v. Attorney General,* 81 F.3d 1235, 1268 (3d Cir. 1996) (sex offender has no liberty interest in purported reputation damage that accompanies registration; citing *Davis,* 424 U.S. at 701); *Cutshall v. Sundquist,* 193 F.3d 466, 479 (6th Cir. 1999) (Tennessee's sex-offender registration act imposes no restrictions on offender's fundamental personal rights or those implicit in concept of ordered liberty); *Paul P. v. Verniero,* 170 F.3d 396, 404 (3d Cir. 1999) (public disclosure of sex offenders' registration information does not violate privacy-based liberty interest). *Doe v. City of Lafayette,* _F.3d_, 2004 WL 1698309, *__ (7th Cir., July 30, 2004), and *Gunderson v. Hvass,* 339 F.3d 639, 643-45 (8th Cir. 2003), rejected substantive due process challenges based on interests different from those asserted by petitioners.

[9] *See Hemline v. State,* 784 A.2d 1058, 1071-74 (Del. 2001) (concluding that no federal liberty interest is implicated by sex-offender registration law); *In re W.M.,* 851 A.2d 431, 447-51 (D.C. 2004) (sex-

In addition, the Alaska Court of Appeals has rejected claims similar to those asserted by petitioners. In *Patterson v. State*, 985 P.2d 1007 (Alaska App. 1999), the court concluded that the Act does not violate Alaska's explicit constitutional privacy guarantee, *id.* at 1016-17, and does not violate substantive due process based on asserted violations of the rights to travel, to obtain employment, or to personal safety, *id.* at 1017-18. The Alaska Supreme Court's decision in *Doe v. State* might appear to overrule *Patterson v. State*, but that is not the case. Unlike the offender in *Doe v. State*, the defendant in *Patterson* did not have the benefit of a suspended imposition of sentence and conviction that was ultimately set aside.

Petitioners' substantive due process claim has evolved and mutated from the purely procedural claim asserted in their amended complaint, to their claims in motions for summary judgment in the district court, to their briefs in the Ninth Circuit, and finally in their petition in this Court. This problem is compounded by the manner in which they have presented those claims at each level. This has created a practical difficulty in failing not only to "carefully formulat[e] the interest at stake," *Glucksberg*, 521 U.S. at 722, but also in failing to sharpen the issues necessary for

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offender registration act does not violate substantive due process (applying fundamental-rights test)); *In re J.A.W.*, 787 N.E.2d 747, 757-60 (Ill.), *cert. denied*, 124 S.Ct. 222 (2003) (registration provisions of sex-offender registration act do not violate substantive due process (applying nonfundamental-rights test)); *In re J.R.*, 793 N.E.2d 687, 695-96 (Ill. App. 2003) (notification provisions of sex-offender registration act do not violate substantive due process (applying nonfundamental-rights test)); *State v. Druktenis*, 86 P.3d 1050, 1066-84 (N.M. App. 2004)(sex offender registration law does not violate substantive due process (applying fundamental- and nonfundamental-rights test)); *State v. Williams*, 728 N.E.2d 342, 355-57 (Ohio 2000) (sex-offender registration does not violate inalienable-rights guarantee of state constitution).

meaningful review by this Court. In light of the fact that substantive due process challenges have been rejected by every court that has considered the issue, this Court should at best await a challenge in which the issues have been drawn and discussed with more precision than has been done in this case.

Petitioners pointedly refer to statements by this Court that they characterize as expressing merit to their claims. [Pet. 8, 9] In *Smith*, the Court simply acknowledged that "other constitutional objections" to the Act were "beyond the scope of this opinion." *Smith*, 538 U.S. at 102. In *Connecticut Department of Public Safety*, the Court noted the possibility that the claim asserted in that case might have been a substantive challenge to the statute recast as a procedural challenge. *Connecticut Dep't of Public Safety*, 538 U.S. at 7-8. In neither case did the Court express any opinion as to the merit of any substantive due process challenge to the statutes considered or to sex offender registration laws in general.

Finally, petitioners' reliance on *Doe v. State*, in an attempt to impeach the Court's analysis in *Smith* of the effects of the Act, is tantamount to a claim of erroneous factual finding. Such a claim "rarely" supports the granting of a writ of certiorari. See Ct. Rule 10. [Resp. App. 58a]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGG D. RENKES
Attorney General

KENNETH M. ROSENSTEIN *
Assistant Attorney General

STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

August 26, 2004

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[March 31, 1999]

No. A94-0206-CV (HRH)

John Doe, *et al.*,

Plaintiffs,

vs.

Ronald L. Otte, Commissioner, *et al.*,

Defendants.

ORDER

Cross-Motions for Summary Judgment

Defendants move for partial summary judgment.[1] This motion is opposed. Plaintiffs' cross-move for summary judgment.[2] This motion is also opposed. Oral argument has not been requested.

FACTS

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010 to -.100 (1994) and AS 18.65.087 (1994),[3] on both federal and state constitutional grounds.

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[1] Clerk's Docket No. 95.

[2] Clerk's Docket No. 107.

[3] In 1998 and 1999, changes were made by the Alaska Legislature to the registration and notification provisions of ASORA. The plaintiffs moved for leave to file a supplemental brief addressing the changes made.

Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the state of Alaska and Bruce M. Botelho, Attorney General for the state of Alaska. They are named in both their official and individual capacities.

Prior to the enactment of ASORA in 1993, hearings were held before the Alaska Legislature. Testimony before the legislature showed that there is a high level of sexual abuse in Alaska, a large and growing number of sexual offenders in Alaska, and a high level of recidivism in sex offenders.

With respect to the high level of sexual abuse in Alaska, the testimony showed that Alaska had the highest child sexual abuse rate in the nation; the rate was said to be approximately six times the national average.[4] Moreover, the sexual assault rate was reported to be the second highest in the nation.[5] Finally, the incidence of rape had increased 91% in the previous two years.[6]

Testimony also indicated that there are a large number of sexual offenders in Alaska. In 1993, for instance, approximately one-fourth of Alaska's prison inmates were incarcerated for sexual offenses.[7] In 1993, 100 sex offenders were

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Clerk's Docket No. 115. The court's analysis of ASORA on the parties' cross-motion for summary judgment addresses the substance of ASORA which was not affected by the recent changes. The nmotion for leave to file supplemental brief is denied.

[4] Hearing on HB 69 before the House State Affairs Committee, 18th Alaska Legislature, 1st Session (Feb. 2, 1993). Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993).

[5] *Id.*

[6] Hearing on CSHB 69 before the Senate Finance Committee, 18th Alaska Legislature, 1st Session (Apr. 28, 1993) (testimony of Cindy Smith, Executive Director, Network on Domestic Violence and Sexual Assault.

[7] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Mar. 3, 1993) (testimony of C.E. Swackhammer, Deputy Commissioner, Dept. of Public Safety).

scheduled to be released, whereas prior to 1993, only 50 sex offenders were released annually.[8] Finally, studies presented to the legislature evidenced an extremely high recidivism rate for sex offenders.[9]

The Alaska Legislature made the following legislative findings:

(1) sex offenders pose a high risk of reoffending after release from custody;

(2) protecting the public from sex offenders is a primary governmental interest;

(3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety; and

(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

§ 1, Ch. 41, SLA 1994.

Based upon this legislative fact-finding, the Alaska Legislature enacted ASORA which included both registration and notification provisions for sex offenders. "Sex offender" is defined as a person convicted of a sex offense[10] in any jurisdiction, regardless of whether the conviction occurred before, after, or on August 10, 1994 (the effective date of

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[8] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993) (testimony of Cindy Smith).

[9] Hearing on HB 69 before the House Finance Committee, 18th Alaska Legislature, 1st Session (Feb. 10, 1993).

[10] Sex offense is defined in AS 12.63.100(3) (1994) as a crime, or an attempt to commit a crime, under AS 11.41.410 to 11.41.438, AS 11.41.450, AS 11.41.455, AS 11.61.125, AS 11.66.110, former AS 11.15.120 or AS 11.15.134, or former AS 11.40.110 or AS 11.40.200, or a similar law in another jurisdiction.

ASORA). To fulfill the registration requirements, a sex offender must register in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender resides at the time of registration and (1) complete a registration form which includes, at a minimum, the sex offenders name, address, place of employment, date of birth, each conviction for a sex offense for which there is a duty to register, all aliases used, and driver's license number; (2) be fingerprinted, and (3) be photographed. AS 12.63.010(b)(1)-(2) (1994).

The registration requirements end 15 years after an offender's unconditional discharge if the offender has only one prior sex offense, but continue for the offender's lifetime if the offender has been convicted of two or more sex offenses. AS 12.63.020(a) (1994).

The notification provisions provide that the public can have access to the offender's name, date of birth, address, photograph, place of employment, and public information about the conviction (date, place, court of conviction, and length of sentence.) AS 18.65.087 (b) (1994). The Department of Public Safety is charged with maintaining a central registry of sex offenders. AS 18.65.087(a) (1994).

Up until June of 1997, anyone could purchase a complete list of the state's registered sex offenders or have a specific search conducted for $10.[11] In addition, a person could look at the list for free at Alaska state trooper offices. "In an ongoing effort to make Alaska communities safer and give the public easy access to information about people convicted or rape of child molestation." The Department of Public Safety made the Alaska Sex Offender Registry database available worldwide via the Internet at http://www.dps.state.ak.us/sorcr/ in June of 1997.[12] At the same time, the state

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[11] Clerk's Docket No. 107, Exhibit 4.

[12] Clerk's Docket No. 197, Exhibit 5 at 1.

waived any charges or fees for requests of paper copies of the list of sex offenders to make the "information available to as many citizens as possible."[13] The opening display of the registered sex offender Internet site contains the following warning: "This information is made available for the purpose of protecting the public. Anyone who uses this information to commit a criminal act against another person is subject to criminal prosecution."[14]

The plaintiffs first brought this suit in 1994. They moved for a preliminary injunction seeking to enjoin the enforcement of ASORA. The motion was denied in part and granted in part. The court found that John Doe I and Doe II were required to register under ASORA; however, it enjoined the state from releasing their registration information as part of the notification procedures. *Rowe v. Burton*, 884 F. Supp. 1372 (D. Alaska 1994).[15]

Plaintiffs John Doe I and John Doe II assert that their civil rights afforded by the United States' [sic] Constitution have been violated because ASORA constitutes: (1) a law by the state of Alaska that modifies existing or prior contracts in violation of Aticle I, Section 10; (2) denial of due process and a violation of the Equal Protection Clause guaranteed by the Fourteenth Amendment; (3) an *ex post facto* law prohibited by Article I, Section 10; (4) an unreasonable search or seizure prohibited by the Fourth Amendment; and (5) an invasion of

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[13] *Id.*

[14] http://www.dps.state.ak.us/sorcr/.

[15] The plaintiffs filed their complaint pseudonymously to prevent disclosure of their identities, and the court ordered them to file an amended complaint using their true names. Clerk's Docket No. 62. When the plaintiffs refused to comply, the court dismissed the case, appealed, and the Ninth Circuit Court of Appeals reversed the dismissal for failure to file in the plaintiffs' true names and remanded for reinstatement of their complaint and the preliminary injunction and for further proceedings.

the plaintiffs' right to privacy. In addition, Jane Doe asserts her own claim that ASORA violates her right to privacy.

In addition, plaintiffs assert numerous pendant state law claims contending that ASORA violated the Alaska Constitution because it constitutes: (1) an invasion of privacy under Article I, Section 22; (2) a denial of due process inconsistent with Article I, Section 7; (3) an *ex post facto* law prohibited by Article I, Section 15; (4) a violation of the Equal Protection Clause guaranteed by Article I, Section 12.

The court shall grant summary judgment under Federal Rule of Civil Procedure 56© only if "there is no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Summary judgment is required if the non-moving party fails to make a showing sufficient to establish the existence of an essential element and upon which the non-moving party bears the burden of proof at trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986).

DISCUSSION

Defendants assert that they are entitled to summary judgment on plaintiffs' claim that ASORA: (1) is an *ex post facto* law,[16] (2) violates their plea bargain contracts; and (3) violates their right to privacy. Plaintiffs cross-move for summary judgment on all their claims.

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[16] Defendants also asset that they are entitled to summary judgment on a claim that ASORA violates the Double Jeopardy clause of the Fifth Amendment of the United States Constitution. However, as the plaintiffs' point out, the Does are not challenging ASORA based upon the claim that it violated the double jeopardy clause. The State's motion for summary judgment on the issue that ASORA does not violate the Double Jeopardy clause is denied because that issue is not before the court.

A.

Ex Post Facto Claim

Plaintiffs claim ASORA is an *ex post facto* law. Article I, Section 10, of the United States Constitution provides that no state shall pass any *ex post facto* law. As *ex post facto* law is one "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Mission*, 4 Wall. 277, 324-26 (1867)). Therefore, the question is whether the registration and/or the notification provisions of ASORA constitute punishment. The parties cross-move for summary judgment on this issue.

Defendants assert that *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert denied* __ U.S. __, 118 S. Ct. 1191 (1998), is dispositive. In *Russell*, the Ninth Circuit held that the registration and notification provisions of the Washington registered sex offender law did not violate the *ex post facto* clause. Plaintiffs seek to distinguish *Russell* on grounds that the registration and notification provisions present in ASORA differ significantly from the Washington law analyzed in *Russell*. They assert that even under *Russell*, the ASORA registration and notification provisions constitute punishment and violate the *ex post facto* clause, thereby entitling them to summary judgment as a matter of law.

The court must employ the "intent-effects" test to determine whether ASORA imposes punishment in violation of the *ex post facto* clause. *Russell*, 124 F.3d at 1087. This test requires that the court first inquire whether the legislature intended the sanction to be punitive. The "intent" prong deals solely with the declared purpose of the legislature as well as the construction and design of the staute. *Id.* Second, the court must consider whether the sanction is so punitive in effect as to prevent the court from viewing it as regulatory or

civil in nature, despite the legislature's intent. *Id.* As to the "effects" prong, a challenging party is required to demonstrate by "the clearest proof" that the statutory scheme is so punitive in effect as to negate the State's non-punitive intent. *Id.*

In *Russell* and *Rowe v. Burton*, the courts considered separately the constitutionality of the registration provisions apart from the constitutionality of the notification provisions. Thus, the court turns first to the registration provisions.

1. Registration Provisions

a. Intent

The court first applies the "intent-effects" test to the registration provisions of ASORA. The court must decide whether the Alaska legislature intended the registration provisions as punitive.

Russell provides this court with guidance as to what to consider in determining the legislature's intent. The court must look to the language of the statute and the overall design of the registration provisions. In *Russell,* the court first looked to the legislative findings as evidencing an unequivocal regulatory motivation. The Washington findings declare:

> "The legislature finds law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction."

Russell, 124 F.3d at 1087 (*quoting* 1990 Wash. Laws, ch. 3, § 401). Defendants submit that *Russell* is dispositive on the issue that the Alaska legislature did not intend the registration provisions as punitive. According to the defendants, the findings of the Alaska legislature are so similar to those in presented in Washington, that *Russell* mandates that this court

find no punitive intent. Both states' findings focus on the protection of the public. However, as the plaintiffs point out, the findings put forth by the Alaska legislature are much less specific pertaining to the need for registration than are the Washington findings. For example, the Alaska findings simply provide that protection of the public from sex offenders is a primary governmental focus. They seem to be geared more for the notification provisions of ASORA than the registration provisions now under discussion. Yet, this distinction alone does not evidence a punitive intent.

The next step the court must undertake to determine the legislature's intent is to look to the overall design of the registration provisions. In *Russell*, the Ninth Circuit found that the overall design of the Washington provisions evidenced a regulatory, not a punitive, intent. Crucial to the court's decision 'was the following. First, the registration provisions did no more than apprise law enforcement officials of certain basic information about an offender living in the area. Second, the registration provisions did not place any restraint on the offenders' movements because they were free to move so long as they notified law enforcement, and they could comply with the registration requirements by simply mailing a written notice to the sheriff. Finally, the court placed importance upon the fact that the information required was not burdensome. *Russell*, 124 F.3d at 1087.

Defendants again argue that *Russell* controls and that the design of ASORA indicates a regulatory intent because there is no evidence of a penal intent. However *Russell* may be distinguishable on several grounds. First, ASORA's registration provisions do require one to register in person; thereby restraining an offender's movement. Second, the information required as part of registration is slightly more burdensome in that the offender must submit to a photograph and be fingerprinted. While these are distinguishing features, they are not of sufficient weight to require a different result from *Russell*

for the following reasons. First, in *Doe v. Pataki,* the Second Circuit, in considering New York's sex offender registration statute, found that the requirement that a person register in person every 90 days (significantly more onerous than the requirement in Alaska which requires initial registration and registration upon moving) was cumbersome, but not "sufficiently severe to transform an otherwise non-punitive measure into a punitive one." *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cr. 1997). Second, the additional requirements of being photographed and fingerprinted are not overly burdensome in light of the considerable benefits to law enforcement deriving from having a photograph and fingerprints to aid in finding an individual if suspected of a future crime.

The plaintiffs then offer six additional arguments in support of their proposition that ASORA registration requirements evidence an objective intent to establish a criminal, not a regulatory, statutory scheme. They point to: (1) the placement of the registration provisions of ASORA (AS 12.63.010) in the state's code of criminal procedure; (2) the focus of the statute; (3) the fact that registration constitutes a new form of post-incarceration supervision; (4) the fact that there is no escape from ASORA's application; (5) the legislature's amending the criminal law by making the registration requirements part of any plea agreement and part of any sentence imposed by the sentencing court; and (6) the imposition of a duty on the offender solely as a result of a past conviction.

According to the plaintiffs, placement of the registration provisions in the state's code of criminal procedure evidences an intent to establish a criminal statutory scheme. Although this court concluded in *Rowe* that codification of ASORA in the criminal code was not evidence of punitive intent, plaintiffs contend that the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), requires this court to hold otherwise. In *Hendricks*, the Supreme

Court felt that "Kansas' objective to create a civil proceeding is evidenced by its placement of the Sexually Violent Predator Act within the Kansas probate code, instead of the criminal code." *Hendricks*, 521 U.S. at 361. It follows then, according to the plaintiffs, that placement of the registration provisions of ASORA in the code of criminal procedure establishes a punitive intent.

Defendants rebut this argument on three grounds. First, they submit that while codification of a statute in a particular title is evidence of a legislative intent, it is not conclusive. In support, they refer the court to *Pataki* 120 F.3d at 1278, where the fact that the New York sex offender registration law was codified in "corrections law" was of little relevance to the determination of legislative intent. Second, defendants note that AS 12 is not limited only to matters directly related to the prosecution and punishment of criminal offenses. For example, the code of criminal procedure contains laws relating to medical examiners and actions for post-conviction relief which are civil actions.[17]

Washington designated its registration provisions as Wash. Rev. Code § 9A.44.130-.140, a part of the Washing-ton Criminal Code. The court in *Russell* did not address this issue, nor did it appear concerned about it. This court adheres to its earlier decision that the Alaska Legislature's placement of the registration provisions in the code of criminal procedure is a practical, logical place to locate the registration requirement.

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[17] Defendants argue that the legislature's codification of a particular statute should not be dispositive of the legislature's intent because the revisor of statutes, not an elected official, has the power to renumber and rearrange the legislature's own codification. However, this argument is weak because the fact remains that the legislature itself intended to place the registration provisions within the code of criminal procedure.

Second, plaintiffs contend that the focus of the registration provisions evidence an intent to establish a criminal statute because ASORA is aimed at sex offenders and not at an activity from which the offender should be barred because of relevant past conduct. They cite *Fleming v. Nestor*, 363 U.S. 603 (1960), for the proposition that if the law is aimed at individuals, rather than an activity from which the individuals should be barred, the law is punitive, not regulatory. *Id.* at 613-14.

However, as the defendants point out, the Supreme Court rioted in *Nestor* that no single, clear basis for deter-mining whether a statute is regulatory or punitive can be derived from the cases leading up to *Nestor* since each case turns on "its own highly particularized context." *Id.* at 616. Moreover, the Supreme Court has upheld laws aimed at individuals rather than at an activity from which the individual should be barred. The Supreme Court did so in *Nestor* where it upheld a statute that terminated social security benefits for persons deported for previous participation in communist activities. *Id.* at 612.21. *See also DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding a statute that prohibited felons from working for waterfront unions).

The court finds that while the registration provisions are aimed at sex offenders rather than an activity, such is at best slight evidence of a legislative punitive intent.

Third, plaintiffs assert that the registration provisions of ASORA are a criminal statutory scheme, that ASORA is nothing more than a new form of post-incarceration supervision because it requires periodic reporting, notice of change of employer, and notice of change of residence, all of which are conditions imposed on post-incarceration in Alaska. Moreover, ASORA is administered by a criminal justice agency—the state troopers. Defendants do not directly rebut this argument, probably because the registration requirements can be construed as a form of post-incarceration supervision.

The Ninth Circuit in *Russell* did not address this issue. This court finds that the registration requirement is supervisory and is sonic evidence of a punitive intent.

Fourth, plaintiffs argue that the fact that there is no escape from ASORA's application reflects the legislature's intent to enact a criminal statutory scheme. However, as the defendants submit, registration statutes have long been recognized as regulatory, not punitive measures. They refer the court to numerous cases where the Supreme Court has upheld the use of registration statutes. Finally, the defendants remind the court that it previously noticed that "[r]egistration is not a concept which this court perceives to be imbued by history with a punitive connotation." *Rowe v. Burton*, 884 F. Supp. 1372, 1378 (D. Alaska 1994). ASORA is essentially regulatory. Registration *per se* is not punitive. Although neither party points it out, it is possible to escape ASORA's application, although not initiallv. The registration provisions do end after 15 years if a person have been convicted of only one offense. AS 12.63.020(a).

Fifth, plaintiffs submit that the fact that the legislature simultaneously amended the criminal law to make registration provisions part of any plea agreement and part of any sentence imposed by the sentencing court evidences a penal intent. This argument puts the cart before the horse. The legislature enacted the registration provisions in response to their findings that registration would make it easier for law enforcement. Notifying those persons who are newly convicted of sex offense crimes that they will be subject to these registration pro-visions as a result of their conviction is the appropriate and fair thing to do. It does not establish that the legislature intended the registration provisions to be punitive.

Sixth, plaintiffs submit that the imposition of a duty (the duty to report to the authorities, the duty to provide one's fingerprints, the duty to be photographed, and the duty to provide information) on the offender, which is imposed solely

as a result of a past conviction, is clear evidence of an intent to establish a criminal statutory scheme because laws which compel the doing of an act, after the fact, violate the prohibition of the *ex post facto* clause. *Calder v. Bull*, 3 U.S. (3 Dall) 386, 388 (1798).

The plaintiffs misstate the scope of the *ex post facto* clause. The focus is upon laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). ASORA does not define a crime. Whether or not ASORA imposes punishment retroactively begs the question under analysis. For purposes of evaluating the legislature's intent, the duty to register is not inherently punitive. It is not evidence of punishment because ASORA is just another regulatory disability —like the loss of the right to vote or deportation—which results from a prior conviction. The fact that a conviction gives rise to the duty to register does not bespeak a punitive intent. Rather, imposing the duty of registration merely addresses the legislative findings that offenders pose a high risk of re-offending after release from custody.

In summary, the court finds no evidence of penal intent in the Legislative findings, in the Alaska Legislature's placement of the registration provisions in the code of criminal procedure, in notifying those persons who are newly convicted of sex offense crimes of the applicability of the registration provisions, or in imposing a regulatory disability upon sex offenders to register. However, the focus of ASORA on sex offenders and not at an activity from which the offender should be barred because of relevant past conduct is slight evidence of punitive intent and the registration requirements are in fact a form of post-incarceration supervision.

Weighing all of the foregoing, the court concludes that the legislature did not act with punitive intent in enacting the registration provisions of ASORA.

b. Effect Prong

The court next considers the second part of the "intent-effects" test. Plaintiffs must show by the "clearest proof" that the registration requirement is "so punitive" in effect that it overcomes the non-punitive legislative intent. If they do so, the law must be considered an *ex post facto* Jaw in violation of the Constitution. In deter-mining whether the plaintiffs have met their burden, the court must consider the *Mendoza-Martinez* factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The court may consider whether:

> [1] the sanction involves an affirmative disability or restraint, [2] it has historically been regarded as a punishment, [3] it comes into play only on a finding of scienter, [4] its operation will promote the traditional aims of punishment-retribution and deterrence, [5] the behavior to which it applies is already a crime, [6] an alternative purpose to which it may rationally be connected is assignable for it, and [7] it appears excessive in relation to the alternative purpose assigned.

Id. (footnotes omitted). The Supreme Court recently emphasized that no one factor should be considered dispositive. *Hudson v. United States*, __ U.S. __ 118 S. Ct. 488, 494 (1997).

The first *Mendoza-Martinez* factor is whether the registration provisions involve an affirmative disability or restraint. The plaintiffs assert that ASORA amounts to an affirmative disability and restraint because requiring them to register deprives them of rights "to which they would otherwise have been entitled, and the deprivation of those rights is caused solely by the past criminal conviction."[18] The Ninth Circuit in *Russell* concluded without analysis that the Washington registration provisions did not impose an

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[18] Clerk's Docket No. 107 at 61.

affirmative restraint or disability. *Russell*, 124 F.3d at 1089. This court has previously held that registration:

> does not affirmatively limit plaintiffs. It does not disqualify the registrant from any activity, personal or professional.

Rowe, 884 F. Supp. at 1378. Finally, as defendants point out, the registration provisions are not significantly more of an affirmative restraint than the provisions for securing an Alaska driver's license. The court concludes that the registration provisions do not impose an affirmative disability or restraint. This factor weighs in favor of a finding of no punitive effect.

The second *Mendoza-Martine* factor considers whether registration has historically been regarded as punishment. Plaintiffs contend that it has. However, this argument was directly addressed and dismissed in *Russell* when the court stated that registration provisions are "typically and historically a regulatory measure." *Russell*, 124 F.3d at 1089. Furthermore, that court went on to cite numerous cases where registration provisions have overwhelmingly been sustained as constitutional. In sum, this factor weighs in favor of a conclusion of no punitive effect.

The third A4endoza-Martinez factor asks the court to weigh if registration only comes into play on a finding of *scienter*. The plaintiffs contend that since the registration provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*.

In rebuttal, defendants submit that registration is not based on a finding of *scienter*, but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The requirement to register is based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders.

Therefore, the court concludes that ASORA's registration provisions do not have a punitive effect because they are not based alone upon a finding of *scienter*.

In analyzing the fourth *Mendoza-Martinez* factor, the court must consider whether the registration provisions promote the traditional aims of punishment-retribution and deterrence. Plaintiffs assert that the registration pro-visions punish and deter crime.

However, as the defendants argue, the fact that registration has a deterrent effect (which the defendants con-cede the registration requirements may have) does not automatically render an otherwise regulatory sanction as punitive. *Kansas v. Hendricks*, 521 U.S. 346, 361. This is true because deterrence can serve both civil and criminal goals. Moreover, for a state action to be deemed retributive, it must amount to a deliberate imposition by the state of some measure intended to chastise, deter, or discipline. *Doe v. Kelley*, 961 F. Supp. 1105, 1111 (WD. Mich. 1997). Plaintiffs have put forth no evidence of a deliberate intent to discipline.

The existence of some deterrent effect does not make the registration provisions punitive in nature. Deterrence alone, particularly absent a showing at retribution, is insufficient without more to render the provisions as punitive.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. Plaintiffs assert that since the registration provisions apply only to those persons who have been convicted of a criminal offense, it is conclusively established that the behavior to which ASORA applies is already a crime. However, the crime of failing to register under ASORA constitutes a separate offense and "[I]t is horn-book law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct [failing to

register under ASORA] took place after the law was passed." *Russell*, 124 F.3d at 1088-89. Therefore, the court finds no evidence of a punitive effect after considering this factor.

The sixth *Mendoza-Martiuez* factor looks at the alter-native purposes to which the registration provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the registration provisions—namely, the protection of the public from sex offenders. The plaintiffs disingenuously dispute the validity of this purpose. The evidence before the legislature and its findings strongly support the need for the protection of the public. Therefore, this factor supports a conclusion that the registration provisions do not have a punitive effect.

The seventh and final *Mendoza-Martinez* factor analyzes whether the registration provisions appear excessive in relation to the alternative purpose.

Plaintiffs argue that the registration provisions are excessive in relation to the purpose because there is no means of being relieved of the registration requirement. The plaintiffs exaggerate. A person who has only one conviction can be relieved from the registration requirements after 15 years. While 15 years is a long time, it is a sufficient amount of time in which to require a person to register and to ensure that the person is unlikely to register and to ensure that the person is unlikely to re-offend. This finding is consistent with *Russell* where the Ninth Circuit held that requiring less serious offenders to register for 10 or 15 years was not excessive given the state interest at stake. *Russell*, 124 F.3d at 1089. Therefore, the court concludes that this factor weighs in favor of finding no punitive effect.

In summary, the court has determined that: (1) the registration provisions do not impose an affirmative disability or restraint upon. the plaintiffs; (2) the registration provisions have not traditionally been considered to be

punishment; (3) the registration provisions are not based only upon a finding of *scienter*; (4) the deterrence factor in the registration provisions, absent a showing or retribution, was insufficient to render the registration provisions punitive; (5) the behavior to which the sanction (failure to register) applies is a separate offense from the underlying crime; (6) the evidence before the legislature and its findings strongly support the need for the protection of the public; and (7) the registration provisions are not excessive in relation to the purpose given the state interest (protection of the public from. the risk of re-offending sex offenders). Based on the foregoing, the court concludes that the plaintiffs have not shown by the clearest proof that the registration provisions are so punitive as to negate the legislature's non-punitive intent. Therefore, the registration provisions do not constitute punishment violative of the *ex post facto* clause. Defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the registration requirements is granted. Plaintiffs' cross-motion for summary judgment is denied.

2. Notification Provisions

a. Intent

The court must consider whether the legislature intended the notification provisions to be punitive by looking to the declared purpose of the legislature as well as the construction and design of the notification provisions. The legislative findings make plain that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." § 1, Ch. 41 SLA 1994. This suggests a regulatory, not a punitive purpose.

Plaintiffs urge three reasons why the construction and design of the notification provisions should be held to evince punitive intent on the part of the Alaska Legislature. First, plaintiffs contend that the notification provisions are located in the Alaska criminal code; thereby evidencing a punitive

intent. Plaintiffs are wrong. The notification provisions of ASORA, AS 18.65.087, are codified in the Health, Safety; and Housing Code. Therefore, it cannot be said that the placement of the notification provisions within the code establishes a punitive intent.

Second, plaintiffs assert that since the legislature amended the criminal law by making the public notification requirements part of any plea agreement and part of any sentence imposed by the sentencing court, it evidences the legislature's intent to enact a punitive law. However, as is more fully discussed *supra* under the registration provisions, notifying persons who are convicted of sex offense crimes that they will be subject to public notification as a result of their conviction is the appropriate and fair thing to do.

Third, plaintiffs submit that an objective intent to establish a criminal statutory scheme is established because ASORA has insufficient limitations on public notification. Without specific limitations on how, when, and what information is released to the public, the release of all information on all offenders evidences an intent to impose punishment.

This argument requires some scrutiny. In *Russell*, the Ninth Circuit found that Washington's law which had stringent restrictions[19] on the release of registration information was not punitive because "[a] law designed to punish an offender would not contain strict limitations on notification." 124 F.2d at 1091. As the plaintiffs point out, ASORA contains no limitations on notification, Rather than limit notification to a specific geographic area like Washington does, under ASORA, the information has been published on the "modern

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[19] Under Washington law, notification occurs only when the release of information is necessary for public protection. The notification occurs two weeks in advance of an offender's release from prison to allow time for the community to prepare for the release, ASORA does not have these protections.

day soap-box"[20] for the entire world to view. Second, under the Washington law public notification is not automatic like it is in Alaska. In Washington an individual determination is made to ascertain whether a sex offender poses a threat to the community. In Alaska, all sex offenders are subject to public notification regardless of their proclivity for re-offending and their level of threat to the community.

Defendants rebut this argument in two ways. First, they assert that plaintiffs ignore the fundamental difference between the notification provisions of the Washington statute and ASORA—namely, that Washington provides for an affirmative notification, whereas ASORA allows passive disclosure. The impact of a government agent going door-to-door to inform residents that a sex offender is in their midst is very different and more intrusive than making public information available to those who want it. The passive disclosure required by ASORA is no more suggestive (and could be viewed as less suggestive) of a punitive intent than Washington law which imposes disclosure upon all in a given area irrespective of whether they need or care to move. Under the notification provisions of ASORA, only those who know that they can access such information and care to do so are aware of sex offenders in their midst.

Second, defendants submit that the plaintiffs have failed to establish that the extra-Alaska dissemination via the Internet contradicts the legislature's regulatory intent. However, ASORA does seem to cast a much wider net than is

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[20] The United States Supreme Court recently compared the Internet to the. 18th century soap-box. The court held that the Internet allows a person to become a "town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, ___ U.S. ___, 117 S. Ct. 2329, 2344 (1977).

absolutely necessary. The fact that a statute is over-broad in some respects does not, without more, derogate from its non-punitive goals:

> The legislature is not required to act with perfect precision, and its decision to cast a net wider than what might be absolutely necessary does not transform an otherwise regulatory measure into a punitive sanction.

Pataki, 120 F.3d at 1253. Assuming a choice between affirmative publication to a narrower population and less intrusive publication of registration information to a wider population, only the most concerned of whom are likely to acquire actual knowledge of registration information, the legislative choice made by Alaska in ASORA does not appear punitive.

In summary, the legislative findings, the fact that the notification provisions are codified in the Health, Safety, and Housing Code, and the requirement that persons who are newly convicted of sex crimes must be told of the notification provisions do not evidence a punitive intent on the part of the legislature. Furthermore, the use of a broad but passive notification does not evidence a punitive intent by the legislature. Based upon the foregoing, the court concludes that the legislature did not intend the notification provisions of ASORA to be punitive in nature.

b. Effect

Plaintiffs submit that they have established by the clearest proof that the notification provisions are so punitive in effect that this court is prevented from viewing them as regulatory or civil in nature, regardless of the legislature's intent. The court must consider the *MendozaMartinez* factors in light of the notification provisions of ASORA.

First, plaintiffs submit that the notification provisions impose an affirmative disability or restraint on sex offenders because they provide broad public access to the information

with no prior determination of the need for the disclosure and no restrictions on use of the information. In support, plaintiffs refer the court to *Kansas v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2508 (1997). In *Myers*, the Kansas Supreme Court concluded that the public disclosure pro-visions imposed an affirmative disability or restraint because unrestricted public access to the registered information leaves open the possibility that the registered offender will be subject to public stigma and ostracism. *Id.* The Ninth Circuit in *Russell* noted, however, that the court could not consider the possible "'vigilante' or illegal responses or citizens to notification." *Russell*, 124 F.3d at 1092. Therefore, the court finds that the public notification provisions do not impose an affirmative disability.

Second, plaintiffs argue that public notification pro-visions have historically been treated as punishment. The Ninth Circuit in *Russell* concedes that historical punishments such as "pillorying, branding, or the sanction described in Hawthorne's *The Scarlet Letter*" are similar to the public notification provisions of sex offender laws. *Russell*, 124 F.3d at 1091. Moreover, "[n]otification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities." *Id.* at 1092. Yet the court noted that while punishment in the past often relied upon humiliation, humiliation alone does not constitute punishment because there must be an intent to punish. *Id.* The court went on to conclude that give Washington's restrictions on disclosure, there was no intent to punish; thus, no 'clear proof' of an overwhelming punitive effect. *Id.* Under ASORA, access to registration information is broad, but it is a passive form of notice. The information is available to those who need and care to inquire, and this too fails to constitute clear proof of an overwhelming punitive effect.

The court concludes that even though the public notification provisions may humiliate sex offenders, the provisions

do not constitute punishment since there has been no showing of an intent to punish.

The third *Mendoza-Martinez* factor asks the court to consider if the notification provisions only come into play on a finding of *scienter*. The plaintiffs contend that since the notification provisions apply only to those convicted of a crime, ASORA turns on a finding of *scienter*. In rebuttal, defendants submit that, like the registration pro-visions, the notification provisions are not based on a finding of *scienter*, but on a legislative finding that sex offenders have a "high risk of reoffending" and the conviction Is simply the evidentiary basis for that finding. § 1, Ch. 41, SLA 1994. The public notification provisions are based not only upon the *scienter* of the underlying crime but also upon the established high rate of recidivism by sex offenders. The court concludes that ASORA's notification provisions do not have a punitive effect because they are not based alone upon a finding of *scienter*.

Fourth, the plaintiffs do not expressly address the retribution and deterrence factor in light of the notification provisions. But the defendants contend that the deterrent effect of disclosure is little different from the deterrent effect of registration. Single disclosure involves only information that is mostly available from other public sources—voter records and criminal records—the defendants argue that it would be illogical to conclude that disclosure becomes retributive simply by making the information more readily available to the public.

Affirmative notification like that in Washington clearly has a deterrent effect. The court is unconvinced that creating a repository of information regarding sex offenders and making that information available to the public under Alaska law will be as effective a deterrent. In *Russell*, the Ninth Circuit found that while the Washington notification provision had a deterrent effect, it did not implicate the other goal of

punishment (retribution) because "it [does not] label [] the offender as more culpable that before (though his or her culpability may be more widely publicized)." *Russell*, 124 F.3d at 1091. Thus the court finds that while the Alaska notification provisions may serve as a deterrent, they do not have a retributive effect since the notification provisions do not seek to punish but rather to make more readily available that which is already public information.

The fifth *Mendoza-Martinez* factor considers whether the behavior to which the sanction applies is already a crime. The parties as well as the court in *Russell* do not directly address this factor. However, under Alaska law, the notification provisions apply only to those persons who have been convicted of a criminal offense. Therefore, the court concludes that the [sic] since the sanction of public notification applies to those already convicted of a crime, this factor weighs in favor of a finding of punitive effect.

The sixth *Mendoza-Martinez* factor looks at the alter-native purposes to which the notification provisions may rationally be connected. Plaintiffs admit that there is an alternative purpose to the notification provisions, namely, the protection of the public. Providing access to a registry of sex offenders does allow the public to protect itself if it so chooses; thus, it appears rationally related. The court therefore finds that because the alternative purpose (protection of the public) is served through the Alaska notification provisions. there is no punitive effect.

Finally, the parties consider whether the notification provisions appear excessive in relation to the alternative purpose.

Plaintiffs assert that the notification provisions are excessive in relation to serving the purpose of public notification. In support, they rely upon *Russell* where the Ninth Circuit found that the Washington act was not excessive because it was narrowly tailored and strictly limited so as to

achieve the goals of protecting the community from persons who had been determined to pose an actual threat. *Russell*, 124 F.3d at 1089-1091. In response, the defendants argue that the Washington safe-guards are necessary only because the Washington statute requires that state agents actively go into a community and notify citizens of the presence of certain sex offenders. The court finds that if it is not excessive to knock on people's doors, then compiling information under ASORA and making the collected data more readily available to those who need and care to know cannot be considered excessive.

In summary, after analyzing the *Mendoza-Martinez* factors in light of Alaska's public notification provisions, the court concludes that the following indicates a finding that the public notification provisions of ASORA do not have a punitive effect because: (1) providing unrestricted access to the information does not impose an affirmative disability; (2) even though the public notification provisions may humiliate sex offenders, they do not constitute punishment since there has been no showing of an intent to punish; (3) the provisions are not based alone upon a finding of *scienter*; (4) while the provisions serve as a deterrent, they are not retributive; (5) protection of the public is served by the public notification provisions; and (6) the provisions are not excessive in relation to serving the purpose of protecting the public. The ASORA notification provisions have application only to those convicted of a crime.

Based upon the foregoing, the court finds that the plaintiffs have not established by the *clearest proof* that ASORA's notification provisions are so punitive in effect as to overcome the non-punitive, express legislative intent. Therefore, defendants' motion for summary judgment on plaintiffs' *ex post facto* claim as it pertains to the notification provisions is granted. Plaintiffs' cross-motion for summary judgment on this subject is denied.

B.

Impairment of Contracts Clause—
Violation of Article I, Section 10

Plaintiffs also move for summary judgment contending that retroactive application of ASORA is barred by Article I, Section 10, of the United Stat3es Constitution. Plaintiffs assert tjat ASORA, by requiring them to register as sex offenders and by providing public disclosure of information. Violates the constitutional prohibition of impairment of contracts since their plea agreements did not contain such requirement.

The parties agree, without citing any authority, that the test for determining whether ASORA impairs the Does' plea agreements is whether ASORA materially altered or modified the contract to the extent that a party to the contract is deprived of rights accruing under the original agreement. The parties also seem to agree that this is an issue of Alaska law, not federal law. But the defendants contend that because it is a question of Alaska law, this court lacks jurisdiction to consider plaintiffs' claim because it is barred by the Eleventh Amendment.

The appropriate test for use by this court is not set forth or argued by either of the parties. Article I, Section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." although the language of the Contracts Clause appears to be absolute, the Supreme Court has recognized that:

> The interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion f the . . . good of the public, through contracts previously entered into between individuals may thereby be effected.

Manigault v. Springs, 199 U.S. 473, 480 (1905).

The three-part inquiry established by the Supreme Court to determine whether a state law violates Article I, Section 10, requires this court to consider whether: (1) the state law has operated as a substantial impairment to the rights owing to a plaintiff under a contractual relationship; (2) assuming a substantial impairment, the state has demonstrated that a significant and legitimate public purpose justifies the regulation; and (3) the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

For purposes of this discussion, the court assumes, without deciding, that the first *United States Trust Co.* factor (impairment of contract rights) is established. Even if ASORA is considered as a substantial impairment, ASORA was enacted in response to the sexual abuse crisis that exists in Alaska and is intended and designed to protect the public. This is clearly a significant and legitimate public purpose justifying the regulation. Finally, and as discussed at length above, the registration and notification provisions are reasonable and rationally related to the purpose of protecting the public from sex offenders.

Based upon the foregoing, the court concludes that ASORA does not violate Section 10 of Article I of the United States Constitution. Therefore, defendants' motion for summary judgment on this issue is granted, and plaintiffs' cross-motion is denied.

C.

Right of Privacy

Plaintiffs assert that the public disclosure provisions of ASORA violate the right to privacy under the United States Constitution and under the Alaska Constitution. According to Doe I and Doe II, public notification infringes upon their

right to "personal privacy and dignity."[21] Jane Doe alleges that public notification infringes upon her right to privacy because it causes "public intrusion into the martial relationship and causes harm to the wife and family of offenders required to register."[22] Because the privacy rights of Doe I and Doe II differ from those asserted by Jane Doe and because of concerns over whether Jane Doe even has standing to assert her claims, the court addresses these issues individually.

1. Privacy Claims under the United States Constitution

a. John Doe I and John Doe II

In *Whalen v. Roe*, the United States supreme court recognized that the Constitution protects two types pf privacy interests: (10 "the individual interest in avoiding disclosure of personal matters" and (2) "the interest in independence in making certain kinds of important decisions." 429 U.S. 589, 599-600 (1977). Plaintiffs allege that state dissemination of criminal history information, current addresses, current place of employment, and "state sponsored intrusions into the family home by neighbors and vigilantes"[23] implicates both types of privacy recognized in *Whalen* because it constitutes the disclosure of personal Matters and affects the plaintiffs' independence in making certain kinds of decisions such as where to live and work and, in the case of Jane Doe, whom to marry.

Defendants contend that the information required as part of the notification process is already a matter of public record and that which is in the public record is not protected by any federal right to privacy; therefore, they are entitled to judgment as a matter of law. *McNally v. Pulitzer Publishing*

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[21] Clerk's Docket No. 107 at 31.

[22] Clerk's Docket No. 107 at 32.

[23] *Id.* at 31.

Co., 532 F.2d 69, 77-78 (8th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976). Moreover, the defendants assert that a person does not have a reasonable expectation of privacy as to his physical characteristics, including one's likeness. *United States v. Dionisio*, 410 U.S. 1, 7 (1973).

Plaintiffs put forth several arguments supporting their motion for summary judgment on the grounds that ASORA goes beyond merely releasing information pertaining to Doe I and Doe II's conviction, matters of public record, and their photos, thus violating their right to privacy.

First, under the public notification provisions, a person's current address and place of employment which is not part of the criminal public record is disclosed. In fact, as the plaintiffs point out, John Doe I and Doe II's criminal files which are over ten years old contain neither their current home addresses nor their places of employment. Therefore, Doe I and Doe II's addresses and places of employment are not part of the public record. They refer the court to *United State Department of Defense v. FLRA*, 510 U.S. 487 (1994), where the Supreme court held that the federal Privacy Act and the Freedom of Information Act prohibited federal employers from disclosing employees' addresses without their consent because a disclosure of home addresses could lead to the intrusion or misuse of that information, thereby constituting a violation of the right to privacy. Finally, the Dies distinguish *Russell* and point out that ASORA has none of the protections which led the Ninth Circuit to find that the public notification provisions of the Washington registration act did not violate the right of privacy because the act provided due process to the offenders before the information could be release, not all offenders fell within the public notification provisions, and the information disseminated was severely limited. *Russell*, 124 F.3d at 1094. The Washington law only provided that the general vicinity where the offender resided be released, not the specific address as is done under

ASORA. The Ninth Circuit found that the fact that an offender's exact address was not released was important and stated that the Washington act did not violate the right of privacy because "the collection and dissemination of information is carefully designed and narrowly limited." *Id.* at 1093.

The defendants rebut on four grounds. First, they contend that *Russell*—which found no violation of the right to privacy—controls. Moreover, the court in *Russell* cited *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995) (*en banc*), for its discussion of the common law invasion of privacy. *Johnson* noted that neither street address nor job title could be characterized as private or highly intimate or embarrassing facts about a person's private affairs such that publication would be highly objection-able to a person of ordinary sensibilities. 47 F.3d 716 at 733. Therefore disclosure of a sex offender's street address or employment should not be considered information protected by the right to privacy under the United State Constitution.

Second, defendants contend that no personal information (information that is private) is disclosed under ASORA because all of the information disclosed under ASORA is available in public records, and they point to the fact that the plaintiffs' addresses are available publicly through voter registration rolls and Alaska Permanent Fund Dividend records.[24] Therefore, defendants assert, Doe I and Doe II have no reasonable expectation of privacy in that which they knowingly expose to the public. The defendants distinguish *Department of Defense v. FLRA* on the grounds that the privacy interest recognized in this case is rooted in federal statutes, not the federal constitution Finally, defendants contend that the Alaska Legislature found that a sex offender's privacy interest is "less important than the government's interest in public safety" and that "release of certain infor-

[24] Although they do not provide proof of this.

mation about sex offenders to . . . the general public will assist in protection the public safety." § 1, Ch. 41, SLA 1994. This legislative determination, under *Nestor*, 363 U.S. at 617, is subject to attack only upon the basis that it is irrational, which the court finds the plaintiffs have not shown.

This court previously rejected plaintiffs' privacy argument, holding that the right to privacy "does not attach to matters already within the public domain." *Rowe*, 884 F. Supp. at 1384. Here, the court is persuaded by defendants' arguments.

Because the information subject to disclosure is either a matter of public record or is not "highly intimate," the court concludes that the public notification provisions of ASORA do not violate Doe I and Doe II's right to privacy under the United States Constitution. Therefore, defendants' motion for summary judgment on Doe I and Doe II's claims that the public notification provisions of ASORA violate the right to privacy under the United States Constitution is granted. Plaintiffs' cross-motion on this issue is denied.

b. Jane Doe

Jane Doe asserts a claim based upon 42 U.S.C. § 1983. In order to maintain an action under 42 U.S.C. § 1983 she must establish: (1) that the defendants deprived her of a right secured by the Constitution and laws of the United States, and (2) that the defendants deprived her of this right under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Jane alleges two injuries in fact: (1) violation of her right to privacy under the United States Constitution, and (2) violation of due process because of a deprived liberty interest, *i.e.*, her state granted right of privacy. The crux of Jane Doe's claim is that she will be injured by release of the information regarding her husband and by release of her home address. She has not shown any actual injury to date, only because an injunction has been in effect since the inception of this

lawsuit. Plaintiff refers the court to sealed exhibits which show that family members or registered sex offenders have suffered harm and been stigmatized.[25] In response, defendants contend that Jane Doe lacks standing to raise such a claim and, even is she has standing, that she is not entitled to summary judgment.

The defendants argue that Jane Doe lacks standing to challenge ASORA because she is not subject to ASORA. She is not a sex offender; she is married to one. Moreover, her affidavit does nothing more than speculate that she "will be seriously harmed" by disclosure of her husband's conviction as a sex offender. Finally, they note that the harm alleged to have been suffered by family members of registered sex offenders is really an unavoidable consequence that resulted from a criminal conviction.

The assertion of a loss of constitutional rights constitutes an injury for purposes of standing. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, Jane Doe, who is asserting a violation of her constitutional rights caused by ASORA, has standing to proceed although she is not a sex offender. *Jane Doe v. Borough of Barrington*, 729 F Supp. 376 (D. N.J. 1990).

Plaintiff moves for summary judgment on her claims. She urges that her expectation of privacy, unlike that of Doe I and Doe II, has never been lowered as a result of criminal conduct and that the information which is released as part of ASORA's notification provisions and which is not part of the public record causes public intrusion into the marital relationship and causes harm to the wife and family of offenders required to register.

Under ASORA, the defendants do not disclose any private information pertaining directly and uniquely to Jane Doe.

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[25] Clerk's Docket No. 101, Exhibits 12, 13, 15 & 16.

Moreover, this situation is distinguishable from that presented in *Doe* v. *Borough of Barrington*, 729 F. Supp. 376 (D. N.J. 1990), where the court found that the government violated the privacy rights of a wife when it publicly disclosed that her husband had AIDS because "[t]he stigma of AIDS extends to all family members whether or not they actually have the disease." *Doe*, 729 F. Supp. at 386. Any stigma of being a sex offender extends only to the sex offender and not to the sex offender's family because being a sex offender is not an infectious disease which could conceivably be passed to one's spouse. Therefore, the court concludes that while Jane Doe has standing to assert a violation of her constitutional right to privacy, she has not come forward with any evidence tending to show that her several or separate privacy rights have been violated. Defendants' motion for summary judgment as to Jane Doe's civil rights claim is granted, and Jane Doe's motion for summary judgment is denied.

2. Privacy Claims under the Alaska Constitution

The court next turns to Doe I and Doe II's claim that ASORA's public notification provisions violate the express guarantee of a right to privacy afforded by the Alaska Constitution. In their cross-motion for summary judgment, plaintiffs assert that they are moving for summary judgment on this issue. Defendants rebut, arguing that this court lacks subject matter jurisdiction to hear this claim based upon Eleventh Amendment immunity.[26]

[26] Eleventh Amendment immunity does not extend to suits seeking declaratory and injunctive relief against state officers in their individual capacities for their failure to protect federal statutory or Constitutional rights. Therefore, the court can hear plaintiffs claims base on violations of federal laws.

Plaintiffs submit that defendants are "belatedly recharacterizing the [plaintiffs'] claims to be claims based on a violation of state law, which they are not."[27] Rather, plaintiffs say that they are not directly asserting state law claims arising under the Alaska Constitution. Plaintiffs' assertion is contradicted by their amended complaint. Plaintiffs expressly title Count III of their amended complaint "Pendant State Law Claims for Declaratory Judgment"[28] which includes an allegation that ASORA violates plaintiff's expectation of privacy protected by Article I, Section 22, of the Alaska Constitution.

In their Count, III, plaintiffs have plainly asserted against the defendants a state claim. State law claims for violation of a right to privacy arising under the Alaska Constitution cannot be considered by this court because they are barred by the Eleventh Amendment.[29] *Pennhurst State School & Hospital v. Haldennan*, 465 U.S. 89, 121 (1984). Defendants are granted summary judgment as to plaintiffs' state law claims.

D.

Due Process

The United States Constitution protects persons from the deprivation of liberty without due process of law. U.S. Const. Amend. XIV. Doe I and Doe II contend that ASORA deprives them of due process of law in violation of the Fourteenth Amendment of the United States Constitution on the following grounds: (1) because the United State Constitu-

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[27] Plaintiffs' Reply Memorandum at 3, Clerk's Docket No. 113.

[28] Clerk's Docket No. 10.

[29] This also applies to plaintiffs' claims that ASORA violates the Alaska Constitution because it constitutes a denial of due process inconsistent with Article 1, Section 7, an *ex post facto* law prohibited by Article I, Section 15, and a violation of the equal protection clause guaranteed by Article I, Section 12.

tion grants them a right to privacy, a liberty interest, which is violated by the release of information under the notification provisions of ASORA without sufficient due process; (2) the Alaska Constitution expressly guarantees a right of privacy, therefore a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest;[30] and (3) the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the state attaching conditions on that reintegration and by the state's broadcasting private informa tion to the world which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community. The parties cross-move for summary judgment on the claims.

Because this court found that none of the plaintiffs have a privacy interest protected by the United State Constitution, the court finds no liberty interest at stake. This is consistent with *Russell*, 124 F.3d at 1094. There-fore, defendants' motion for summary judgment on this issue is granted and plaintiffs' cross-motion is denied.

The crux of plaintiffs' second ground for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution expressly guarantees a right of privacy, therefore, a liberty interest exists and ASORA violates the Due Process Clause of the United States Constitution by infringing upon that liberty interest.

Defendants dismiss this argument on the basis that plaintiffs are trying to disguise a state law claim barred by the Eleventh Amendment and defendants elect not to address the argument at all. However, an alternative way for litigants to bring state law claims into federal court is to argue, as plaintiffs have done, that the state law, here the Alaska Constitution, gives rise to a liberty interest protected by

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[30] Jane Doe also asserts this claim.

the Due Process Clause. Edwin Chemerinsky, *Federal Jurisdiction,* § 7.5.

According to the plaintiffs, this creates a federally protected liberty interest. In support, they refer to two Alaska Supreme Court cases which concluded that the right to privacy is liberty interest. *See Breese v. Smith*, 501 P.2d 159 (Alaska 1972), and *Ravin v. State*, 537 P.2d 494 (Alaska 1975). The crux of the plaintiffs' claim is that the legislature has done what the voters had intended Article I, Section 22, to prevent. By releasing sex offenders' home addresses, ASORA invaded the offenders' right to live peaceably in their homes, their right to association with family and friends, and their right to work. Moreover, this invasion of the right to privacy is done without notice and opportunity to be heard and without first making a determination of the need for each disclosure by finding that the individual subject to disclosure actually presents a threat to the public. Thus, plaintiffs posit, ASORA denies due process.

The court in *Russell* found no due process violation because they found no violation of the right to privacy. However, the court in *Russell* was confronted only with a challenge to the United States Constitution. The situation in Alaska may warrant a different result. First, the Alaska Constitution, unlike the United States Constitution, expressly provides for a right of privacy.

Under Alaska law, this gives rise to a liberty interest. Further, the Washington law provides for a notice and opportunity to be heard before public disclosure is made.

The test for determining what process is due an individual subject to a possible deprivation of a protected liberty interest is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court must consider: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and

the probable value, if any, of additional or substitute procedural safeguards: and (3) the defendant's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335. The parties provide the court with no appropriate analysis of the facts of this case using the test set forth in *Mathews*. Therefore, plaintiffs' motion for summary judgment on this issue is denied with leave to renew. Defendants' motion for summary judgment on the grounds that plaintiffs' due process claim is barred by the Eleventh Amendment is denied.

Plaintiffs' third grounds for asserting a violation of the Due Process Clause of the United States Constitution is that the Alaska Constitution grants a right to rehabilitation and reintegration which is abrogated by the defendants' attaching conditions on that reintegration and by the state's release of information which interferes with the registrant's ability to work, seek housing, and to interact with other members of the community.[31]

Article I, Section 12, of the Alaska Constitution has been interpreted as granting to an offender the right to rehabilitate and reintegrate with all those rights possessed by any other member of the public:

> the public is not the sole beneficiary of this constitutional requirement. The constitution speaks of penal administration being based on the "principle of reformation." Reformation relates to something being done to rehabilitate the offender into a noncriminal member of society. True, society will benefit from this, but so will the offender since, to the extent that he is rehabilitated into a law-abiding person, his inherent dignity as a

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[31] Defendants again elect not to address this argument and instead rely upon the fact that plaintiffs are merely disguising a state law claim barred by the Eleventh Amendment.

> human being will be enhanced. He will be the object of respect, rather that of fear and loathing by his fellow citizens, and to that extent, will benefit from the sense of personal satisfaction enjoyed by those who live decent lives, unsullied by disobedience and rebellion against the laws by which we govern ourselves in a peaceful and tranquil society.

Abraham v. Alaska, 585 P.2d 526, 531 (Alaska 1978).

Therefore, the gravamen of plaintiffs' argument is that Doe I and Doe II had a federally protected right to meaningful access to rehabilitation and to full integration which includes the right to unconditionally reenter society with all civil rights restored and to then live a normal life and not be the object of fear or loathing by fellow citizens. ASORA allegedly violates plaintiffs' reentry rights from a federal constitutional perspective by placing conditions on that reentry by requiring persons convicted of sex offenses to register with the authorities and to periodically report to the authorities as if they were on court probation without an opportunity to be heard.

Because the parties again failed to provide the court with an analysis of this argument and the pertinent facts in this case in light of the framework established by the United State Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the court denies plaintiffs' motion for summary judgment with leave to renew.

E.

Fourteenth Amendment—Equal Protectipn
and
Fourth Amendment—Search and Seizure

Although plaintiffs contend they are moving for summary judgment on all of their claims, plaintiffs put forth no discussion of their claim that ASORA violates the equal protection clause of the Fourteenth Amendment. Plaintiffs also

fail to provide a discussion of their claim that the finger-printing and photographing requirements of ASORA violate the Fourth Amendment of the United State Constitution.

A motion for summary judgment must contain a "brief statement of points and authorities relevant to the relief requested." D. Ak. L.R. 7.l(a)(2). The failure to include proper materials in support of a motion subjects the motion to summary ruling by the court *sua sponte*. D. Ak. L.R. 7.1(d). Therefore, plaintiffs' motion for summary judgment on these two constitutional issues is denied ¼rith leave to renew upon the proper filing of an applicable statement of points and authorities pertaining to them.

CONCLUSION

Based upon the foregoing: (I) defendants' motion for summary judgment on plaintiffs' *ex post facto* claims is granted, and plaintiffs' cross-motion for summary judgment is denied; [32] (2) defendants' motion for summary judgment on plaintiffs' Contracts Clause claim is granted, and plaintiff's cross-motion for summary judgement is denied;[33] (3) defendants' motion for summary judgment on plaintiffs' federal right to privacy claims is granted, and plaintiffs' cross-motion for summary judgment is denied;[34] (4) defendants' motion for summary judgment on plaintiffs' Count III, pendant state law claims, is granted, and plaintiffs' cross-motion for summary judgment is denied;[35] (5) defendants' motion for summary judgment on plaintiffs' federal due process claims is granted as to plaintiffs' federal privacy interest claims, but denied as to plaintiffs' claims of federal due process based upon state privacy interests and state right to rehabili tation and

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[32] *See* pages 7 through *32, infra.*

[33] *See* pages 32 through 34, *infra.*

[34] *See* pages 34 through 42, *infra.*

[35] *See* pages 42 through 43, *infra.*

reintegration, and plaintiffs' cross-motion for summary judgment is denied with leave to renew as to federal due process based upon state rights;[36] (6) plain-tiffs' motion for summary judgment on their Fourteenth Amendment (equal protection) and Fourth Amendment (search and seizure) claims are denied with leave to renew.[37] If no such renewed motion(s) is filed on or before April 30, 1999, the court will deem plaintiffs to have abandoned these claims, and the clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice and vacating the preliminary injunction.

DATED at Anchorage, Alaska, this 31 day of March, 1999.

/s/ H. Russel Holland
H. RUSSEL HOLLAND, Judge
District of Alaska

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[36] *See* pages 43 through 48, *infra.*

[37] *See* pages 48 through 49, *infra.*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed August 12, 1999]

No. A94-0206-CV (HRH)

JOHN DOE I, *et al.*,

Plaintiffs,

vs.

RONALD O. OTTE,
Commissioner, *et al.*,

Defendants.

ORDER

Cross-Motions for Summary Judgment

Plaintiffs move for summary judgment on their claim that the Alaska Sex Offender Registration Act ("ASORA") violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[1] Defendants oppose and cross-move for summary judgment.[2] Oral argument has not been requested and is deemed unnecessary.

Facts

Plaintiffs are two convicted sex offenders, John Doe I and John Doe II, and Jane Doe, wife of John Doe I. They are challenging Alaska's Sex Offender Registration Act ("ASORA"), AS 12.63.010-12.63.100 and AS 18.65.087.

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[1] Clerk's Docket No. 119.

[2] Clerk's Docket No. 123.

Defendants are Ronald L. Otte, Commissioner of the Department of Public Safety for the State of Alaska, and Bruce M. Bothelo, Attorney General for the state of Alaska. They are named in both their official and individual capacitites.

On March 31, 1999, the court granted defendants' motion for summary judgment[3] on all but two issues.[4] The plaintiffs' cross-motion[5] was denied, but they were granted leave to renew their federal due process claims that were based on alleged violations of their state-created constitutional rights to privacy and rehabilitation.[6] These claims are now the subject of the parties' pending cross-motion s for summary judgment.

Discussion

Plaintiffs move for summary judgment asserting that ASORA violates the Fourteenth Amendment, Due Process Clause, of the United States Constitution because it invades important liberty interests granted by the Alaska Constitution. The defendants cross-move for summary judgment. The parties acknowlede that resolution of these cross-motions would require a determination of whether ASORA violates certain provisions of the Alaska Constitution: the right to privacy granted by article I, section 22, the right to travel, the

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[3] Clerk's Docket No. 95.

[4] Clerk's Docket No. 118.

[5] Clerk's Docket No. 107.

[6] Clerk's Docket No. 118, at 48-49. Plaintiffs were also granted leave to renew two additional claims which they expressly abandon in this motion for summary judgment:

> whether ASORA violates the Does' Fourth Amendment right to be free from unreasonable search and seizure, and whether ASORA violates the Equal Protection Clause of the Fourteenth Amendment. Memorandum of Points and Authorities at 2, Clerk's Docket No. 119.

right to be let alone, and the right to be free from governmental control granted by article I, section 1; and the right to rehabilitation and reintegration guaranteed by article I, section 12.

At the time the parties' cross-motions were filed, the state courts of Alaska had not yet considered whether ASORA violated the Alaska Constitution and defendants urged this court to certify the issue to the Alaska Supreme Court. On July 23, 1999, the Alaska Court of Appeals issued its decision in *Patterson v. State*, __ P.2d __I No. A-6718, slip op. 1641 (Alaska App., July 23, 1999). In *Patterson*, the Alaska Court of Appeals held that ASORA does not violate the right to privacy under article I, section 22, of the Alaska Constitution.[7] *Id.* at 19-20. The court also held that ASORA did not violate the substantive due process clause because it does not infringe upon a sex offender's right to travel, obtain employment, and personal safety. *Id.* at 21.

While the court in *Patterson* did not address the right to rehabilitation or reintegration, the court noted that Patterson had not show liberty interest." *Id.* at 21. Even assuming a liberty interest existed arising from the right to rehabilitation and reintegration, a statute violates substantive due process under Alaska law only if the statute has no reasonable relationship to a legitimate governmental purpose. *Id.* at 21-22. Since the registration and notification provisions according to *Patterson* are rationally related to the legitimate purpose of ensuring public safety, *Id.* there is no violation of substantive due process. Moreover, the right to rehabilitation and reintegration is coupled with other important

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[7] Plaintiffs assert that Alaska law gives them a right to be left alone and to be free of government control. To the extent that there is a right to be left alone, it is a subset of the plaintiffs' Article I, Section 22, right to privacy under the Alaska Constitution. ASORA does not violate plaintiffs' right to be left alone. Article I, Section 1, does not contain a right to be free of government control.

constitutional considerations in article I, section 12, of the Alaska Constitution which provides:

> Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender the rights of victims of crimes, restitution from the offender, and the principle of reformation.[8]

Thus in making provision for reformation of persons such as Doe I and II, the Alaska Legislature was bound to consider and make provision for the protection of the public as well as reformation of criminals. Plaintiffs have not shown that ASORA fails to strike a proper balance between reformation of sex offenders and protection of the public.

The Alaska Court of Appeals determined the ASOBA does not violate the Alaska Constitution; therefore, there is no state granted liberty interest which can be protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Although the issues raised by Jane Doe were not before the Alaska Court of Appeals in *Patterson*, defendants are entitled to summary judgment on Jane Doe's claim that ASORA violates her right to privacy granted by the Alaska Constitution. If Doe I does not have a right to privacy afforded by the Alaska constitution, Jane Doe's claim must fall also because she has made no showing that the provisions of ASORA were directed towards her, and under ASORA the defendants do not disclose any private information pertaining directly or uniquely to Jane Doe.

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[8] Article I, section 12, so reads today. When this suit was commenced, that section read:

> Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

CONCLUSION

Based on the foregoing, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment in granted. The clerk of court shall enter judgment dismissing plaintiffs' complaint with prejudice.

DATED at Anchorage, Alaska, this 12 day of August, 1999.

/s/ H. Russel Holland
H. RUSSEL HOLLAND, JUDGE
District of Alaska

APPENDIX C

Alaska Statute 11.41.434 (1983) provided:

(a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska Statute 11.51.100(a) provides:

A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

(2) leaves the child with another person who is not a parent, guardian, or lawful custodian of the child knowing that the person

(A) is registered or required to register as a sex offender under AS 12.63 or a law or ordinance in another jurisdiction with similar requirements;

(B) has been charged by complaint, information, or indictment with a violation of AS 11.41. 410–11.41.455 or a law or ordinance in another jurisdiction with similar elements; or

(C) has been charged by complaint, information, or indictment with an attempt, solicitation, or conspiracy to commit a crime described in (B) of this paragraph; or

(3) leaves the child with another person knowing that the person has previously physically mistreated or had sexual contact with any child, and the other person causes physical injury or engages in sexual contact with the child.

Alaska Statute 11.56.840 provides:

(a) A person commits the crime of failure to register as a sex offender or child kidnapper in the second degree if the person knowingly fails to (1) register, (2) file the written notice of change of address, (3) file the annual or quarterly written verification, or (4) supply all of the information required to be submitted under (1)–(3) of this subsection, as required in AS 12.63.010.

(b) Failure to register as a sex offender or child kidnapper in the second degree is a class A misdemeanor.

Alaska Statute 11.81.250 provides:

(a) For purposes of sentencing under AS 12.55, all offenses defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, are classified on the basis of their seriousness, according to the type of injury characteristically caused or risked by commission of the offense and the culpability of the offender. Except for murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, the offenses in this title are classified into the following categories:

(1) class A felonies, which characteristically involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person;

(2) class B felonies, which characteristically involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order;

(3) class C felonies, which characteristically involve conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies;

(4) class A misdemeanors, which character-istically involve less severe violence against a person, less serious offenses against property interests, less serious offenses against public administration or order, or less serious offenses against public health and decency than felonies;

(5) class B misdemeanors, which characteristically involve a minor risk of physical injury to a person, minor offenses against property interests, minor offenses against public administration or order, or minor offenses against public health and decency;

(6) violations, which characteristically involve conduct inappropriate to an orderly society but which do not denote criminality in their commission.

(b) The classification of each felony defined in this title, except murder in the first and second degree, attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, misconduct involving a controlled substance in the first degree, and kidnapping, is designated in the section defining it. A felony under Alaska law defined outside this title for which no penalty is specifically provided is a class C felony.

(c) The classification of each misdemeanor defined in this title is designated in the section defining it. A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a class A misdemeanor.

Alaska Statute 28.10.505 provides:

(a) Notwithstanding AS 44.99.300 and except as provided in this section, the department may not disclose personal information contained in motor vehicle records maintained by the department under this chapter.

(b) Personal information shall be disclosed for use in connection with matters of motor vehicle or driver safety or theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles and dealers by motor vehicle manufacturers; and removal of nonowner records from the original owner records of motor vehicle manufacturers as required by federal law.

(c) Personal information may be disclosed if the requesting person demonstrates, in a form and manner the department prescribes, that the requesting person has obtained the written consent of the person who is the subject of the information.

(d) Personal information may be disclosed by the department upon proof of the identity of the person requesting a record and representation by the requesting person that the use of the personal information is strictly limited to one or more of the following uses:

(1) for use by a government agency, including a court or law enforcement agency, in carrying out its functions, or a private person or entity acting on behalf of a government agency in carrying out its functions;

(2) for use in the normal course of business by a legitimate business or an agent, employee, or contractor of the business, but only

(A) to verify the accuracy of personal information submitted by an individual to the business or an agent, employee, or contractor of the business; and

(B) if the information submitted is not correct, to obtain the correct information, but only for the purposes of preventing fraud by pursuing legal remedies against, or recovering on a debt or security interest against, an individual;

(3) for use in connection with a civil, criminal, administrative, or arbitration proceeding in a court or government agency or before a self-regulatory body, including service of process and the execution or enforcement of a judgment or court order;

(4) for use in research activities, or in producing statistical reports, if the personal information is not published, redisclosed, or used to contact an individual;

(5) for use by an insurer or insurance support organization, or by a self-insured entity, or an agent, employee, or contractor of an insurer, in connection with claims investigation activities, anti-fraud activities, rating, or underwriting;

(6) for use in providing notice to the owners of towed or impounded vehicles;

(7) for use by an employer or an agent or insurer of an employer to obtain or verify information relating to a holder of a commercial driver's license that is required under 49 U.S.C. 31101–31162 (Commercial Motor Vehicle Safety Act);

(8) for use in connection with the operation of private toll transportation facilities;

(9) for use in connection with a legitimate business operating under a contract with the department;

(10) for bulk distribution for surveys, marketing, or solicitations if the person who is the subject of the information has provided written consent to the release; and

(11) for any other purpose specifically authorized by law that is related to the operation of a motor vehicle or related to public safety.

(e) Personal information contained in an individual record may be disclosed, without regard to the intended use of the personal information, if the person who is the subject of the information has provided written consent to the release.

(f) In this section,

(1) "disclose" means to engage in a practice or conduct that makes available or makes known personal information contained in records of the department about a person to another person, organization, or entity by any means of communication;

(2) "individual record" means a record containing personal information about a designated person who is the subject of the record, as identified in a request for information;

(3) "personal information" means information that identifies a person, including a name, address, telephone number, and medical or disability information, but does not include information on vehicular accidents, driving—or equipment-

related violations, driver's license or registration status, or a zip code.

Alaska Statute 34.70.050 provides:

The Real Estate Commission established under AS 08.88.011 shall establish the form of the disclosure statement required by AS 34.70.010. The disclosure statement must include a provision that notifies transferees

(1) that they are responsible for determining whether a person who has been convicted of a sex offense resides in the vicinity of the property that is the subject of the transferee's potential real estate transaction;

(2) where information about the location of convicted sex offenders can be obtained; and

(3) that they are responsible for determining whether, in the vicinity of the property that is the subject of the transferee's potential real estate transaction, there is an agricultural facility or agricultural operation that might produce odor, fumes, dust, blowing snow, smoke, burning, vibrations, noise, insects, rodents, the operation of machinery including aircraft, and other inconveniences or discomforts as a result of lawful agricultural operations.

Alaska Statute 47.10.011 provides:

Subject to AS 47.10.019, the court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to any of the following:

(1) a parent or guardian has abandoned the child as described in AS 47.10.013, and the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter;

(2) a parent, guardian, or custodian is incarcerated, the other parent is absent or has committed conduct or created conditions that cause the child to be a child in need of aid under this chapter, and the incarcerated parent has not made adequate arrangements for the child;

(3) a custodian with whom the child has been left is unwilling or unable to provide care, supervision, or support for the child, and the whereabouts of the parent or guardian is unknown;

(4) the child is in need of medical treatment to cure, alleviate, or prevent substantial physical harm or is in need of treatment for mental injury and the child's parent, guardian, or custodian has knowingly failed to provide the treatment;

(5) the child is habitually absent from home or refuses to accept available care and the child's conduct places the child at substantial risk of physical or mental injury;

(6) the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately;

(7) the child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to adequately supervise the child; if a parent, guardian, or custodian has actual notice that a person has been convicted of a sex offense against a minor within the past 15 years, is registered or required to register as a sex offender

under AS 12.63, or is under investigation for a sex offense against a minor, and the parent, guardian, or custodian subsequently allows a child to be left with that person, this conduct constitutes prima facie evidence that the child is at substantial risk of being sexually abused;

(8) conduct by or conditions created by the parent, guardian, or custodian have

(A) resulted in mental injury to the child; or

(B) placed the child at substantial risk of mental injury as a result of

(i) a pattern of rejecting, terrorizing, ignoring, isolating, or corrupting be-havior that would, if continued, result in mental injury; or

(ii) exposure to conduct by a household member, as defined in AS 18.66.990, against another household member that is a crime under AS 11.41.100–11.41.220, 11.41.230(a)(1) or (2), or 11.41.410–11.41.432, an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41.100–11.41. 220, 11.41.230(a)(1) or (2), or 11.41.410–11.41.432, an attempt to commit an offense that is a crime under AS 11.41.100–11.41.220 or 11.41.410–11.41.432, or an attempt to commit an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41.100–11.41.220 or 11.41.410-11.41.432; or

(iii) repeated exposure to conduct by a household member, as defined in AS 18.66.990, against another household member that is a crime under AS 11. 41.230(a)(3) or 11.41.250–11. 41.270 or an offense under a law or ordinance of another jurisdiction having elements similar to a crime under AS 11.41. 230(a)(3) or 11.41.250–11.41.270;

(9) conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect;

(10) the parent, guardian, or custodian's ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child; if a court has previously found that a child is a child in need of aid under this paragraph, the resumption of use of an intoxicant by a parent, guardian, or custodian within one year after rehabilitation is prima facie evidence that the ability to parent is substantially impaired and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child as described in this paragraph;

(11) the parent, guardian, or custodian has a mental illness, serious emotional disturbance, or mental deficiency of a nature and duration that places the child at substantial risk of physical harm or mental injury;

(12) the child has committed an illegal act as a result of pressure, guidance, or approval from the child's parent, guardian, or custodian.

Supreme Court Rule 10 provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a de parture by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 15.2 provides:

A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that

bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.